IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1395

ROBERT ZARINSKY,

Petitioner,

vs.

STATE OF NEW JERSEY and
ROBERT S. HATRAK, Principal Keeper,
Rahway State Prison,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATE OF NEW JERSEY

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Robert Zarinsky, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The following Opinions and Orders are appended for the convenience of the court:

A. The Opinion of the Appellate Division of the Superior Court of New Jersey, dated July 20, 1976, affirming petitioner's conviction is reported at 143 N.J. Super. 35, 362 A.2d 611, and is attached as Appendix A to this petition.

B. The unpublished Report and Recommendation of the United States Magistrate, dated May 30, 1978, recommending that petitioner's application be denied is attached as Appendix D to this petition.

C. The unpublished Opinion and Order of the United States District Court for the District of New Jersey, dated September 22, 1978, dismissing petitioner's application is attached as Appendix E to this petition.

D. The unpublished Order of the United States Court of Appeals for the Third Circuit, dated December 11, 1978, denying petitioner's motion for a certificate of probable cause is attached as Appendix F to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether the Courts below erred in determining the time at which the petitioner became an accused for purposes of the speedy trial guarantee.

Whether a conviction based on a record lacking relevant evidence on a crucial element of the offense charged violates due process.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 27, 1969, petitioner was arrested in connection with the disappearance of Rosemary Calandriello. Miss Calandriello, last seen in the company of the petitioner, has neither been seen nor heard from since August 25, 1969. On August 28, 1969, petitioner was charged with having abducted Miss Calandriello for an immoral purpose. No action having been taken on this charge, the

complaint was dismissed in June 1970 for unnecessary delay in presenting the charge to a grand jury. On February 20, 1975, approximately five years and six months after the original arrest, the petitioner was indicted for the murder of Rosemary Calandriello. Petitioner's pretrial motions to dismiss the indictment due to a violation of the speedy trial guarantee were denied, and the trial commenced on April 7, 1975. A verdict of guilty was returned on April 23, 1975.

Petitioner appealed. The Appellate Division of the Superior Court of New Jersey rejected all of the petitioner's contentions and affirmed the conviction (Appendix A). A petition for certification was made to the New Jersey Supreme Court, which limited its review to the question of whether there is a statute of limitations for murder in New Jersey (Appendix B). The New Jersey Supreme Court denied the petitioner's motion for a reconsideration of the limitation of the grant of certification (Appendix C). Addressing only the question of a statute of limitations, the New Jersey Supreme Court affirmed the petitioner's conviction. 75 N.J. 101, 380 A.2d 685 (1977).

The petitioner filed a petition for a writ of habeas corpus in the United States District Court of the District of New Jersey, raising a number of issues, including the denial of a speedy trial and the lack of evidence on a crucial element of the offense charged. A United States Magistrate filed a Report and Recommendation (Appendix D), recommending that petitioner's application be denied without evidentiary hearing or certificate of probable cause. The Magistrate concluded that the period of delay in bringing petitioner to trial was not to be measured from August 27, 1969 the date of petitioner's first arrest in connection with the disappearance of Rosemany Calandriello, to April 7, 1975, the date on which petitioner's

trial for the murder of Rosemary Calandriello began. Rather, the Magistrate argued that the "trial was delayed at most from August 28, 1969, when [the petitioner] was arrested on the abduction complaint, to May 29, 1970, when that charge was dismissed and from February 20, 1975, the date of the indictment, to April 7, 1975, when trial began, or less than 11 months. . ." (Appendix D, page 3). This delay, the Magistrate concluded, was not "Presumptively prejudicial" in light of the circumstantial nature of the prosecution's case, Rosemary Calandriello's body having never been found. The Magistrate urged that the delay was for the legitimate purpose of strengthening the inference of Rosemary's death "in anticipation of a defense argument that Rosemary Calandriello had not been missing so long that the jury could find beyond a reasonable doubt that she was dead" (Appendix D, page 4). The Magistrate summarily disposed of the petitioner's claim based on the lack of evidence of an element of the offense charged. On September 22, 1978, the United States District Court for the District of New Jersey issued an opinion responding to the petitioner's Objections to the Report and Recommendation of the Magistrate and an Order adopting the Report and Recommendation of the Magistrate as the opinion of the District Court (Appendix E). On December 11, 1978, the United States Court of Appeals for the Third Circuit denied petitioner's motion for a certificate of probable cause (Appendix F).

REASONS FOR GRANTING THE WRIT

Point I

The Courts below erred in determining the time at which the petitioner became an accused for purposes of the speedy trial guarantee.

The right to a speedy trial extends only to those persons who have been "accused" in the course of a criminal prosecution. This Court has established that arrest constitutes the initiation of prosecution, and thus deems one an accused for purposes of securing the protections of the Sixth Amendment. *Dillingham v. United States*, 423 U.S. 64 (1975). The application of the speedy trial provision need not await formal indictment; arrest is sufficient to subject an individual to the prejudice and disruption which the Sixth Amendment seeks to minimize. *United States v. Marion*, 404 U.S. 307 (1971).

This case raises the question of when the protection of the Sixth Amendment attaches in the case of multiple charges arising from a single incident or event. The question is thus whether the initial arrest deems one an accused for all charges arising out of the same incident.

On August 27, 1969, the petitioner was arrested in connection with the disappearance of Rosemary Calandriello. In June 1970, a charge of abduction arising out of this incident was dismissed for an unnecessary delay in presenting the charge to a grand jury. On April 7, 1975, the petitioner was tried on a charge of murder arising from the same incident for which he was arrested in 1969.

The prosecution argues that petitioner was not accused of murder until his indictment on that specific charge on February 20, 1975. This approach to the speedy trial guarantee is inconsistent with the *Marion* use of arrest as the point at which right to a speedy trial attaches. Delay of a trial is properly measured from the initial prosecutorial response to the alleged criminal activity, rather than from the filing of a specific charge arising out of the activity. Formal charges often follow an arrest. In addition, the formal charge frequently is different from the charge made at the time of the arrest. The time for measuring the speedy trial claim is thus the time of arrest for the activity giving rise to the trial, and not from the time of the subsequent filing of charges. To hold otherwise would invite the government to circumvent the speedy trial provision by alleging and prosecuting *seriatim* the offenses inherent in a single incident:

> At arrest there are no formal charges usually outstanding. However, the right to speedy trial attaches. It must by implication attach therefore to all charges accruing to the sovereign springing from the incident giving rise to arrest. The prosecution can't hold out a 'kicker' from the effect of the Sixth Amendment by not putting it in the formal indictment once a person is an accused. This interpretation of Marion is clearly in line with our traditional dislike of serial and piecemeal prosecutions. [*United States v. Small*, 345 F. Supp. 1246, 1249 (E.D. Pa. 1972)].

Thus, the inquiry must be whether the activities for which the petitioner was convicted were the same activities for which he was arrested in 1969:

> Because the activities forming the basis of conviction under review are those for which the appellants were originally arrested, we hold that the right to a speedy

> trial attached on the date of the initial arrests. [*United States v. Avalos*, 541 F.2d 1100, 1108-09 (5th Cir. 1976)].

Both the 1975 murder conviction and the 1969 abduction charges were based primarily on evidence that Rosemary Calandriello was last seen with petitioner. All evidence presented by the prosecution at the murder trial, except proof of Rosemary Calandriello's continued absence, was originally obtained in 1969 and 1970 in anticipation of a trial on the abduction charge. The only difference between the abduction and murder charges was the passage of time, the very interest that the Sixth Amendment is designed to protect. In the murder prosecution, the state merely suggested that the passage of over five years, considered along with the old evidence of abduction, established the death of Rosemary Calandriello. It is thus clear that petitioner was indeed tried in 1975 for the same activities for which he was originally arrested in 1969.

This analysis reveals the highly anomolous posture of petitioner's case. An abduction charge based upon the August 25, 1969 incident has been dismissed for unnecessary delay, while a second charge, based upon the same incident yet filed over five years later, has been upheld. A similar irony was observed by the court in *State v. Moore*, 147 N.J. Super. 490, 371 A.2d 742 (App. Div. 1977). In *Moore*, defendant was charged on February 6, 1967, with the rape of a 13 year old female, allegedly committed on January 11, 1967. On September 25, 1970, the charge was dismissed due to a speedy trial violation. On July 20, 1971, a grand jury returned indictments for different offenses, all based upon the incident of January 11, 1967. The court held that the delay in the trial of the second group of indictments was not to be measured from the time of the indictments, but from the time of the arrest for the activities given rise both the 1967 and 1971 indictments. The court expressed amazement at the attempt to circumvent the speedy trial provision by dividing a simple incident into a series of separately prosecuted charges:

> We express . . . an inability to comprehend the reasoning which produced a dismissal of the carnal abuse charge because of a lack of a speedy trial, and yet permitted subsequent charges for alleged offenses arising out of the same incident to stand. [147 N.J. Super. at 498, 371 A.2d at 746].

The District Court argues that *Moore* is disinguishable from the present case in that in the former the defendant was under indictment for the first charge for three years, while petitioner in the present case was never indicted for the first charge. This distinction does not rise to constitutional significance. *Dillingham* and *Marion* clearly establish that delay in trial is to be measured from the time of the arrest to the time of the trial. The fact of indictment is not determinative.

Thus, in this case the delay in bringing petitioner to trial on the murder charge is to be measured from the time of his arrest for the activity upon which the conviction was based until the start of the trial, a period of five years and eight months. The mistaken calculation below in determining the length of delay in trial will require a full evidentiary hearing to determine if the delay constituted a denial of a speedy trial.

In *Wingo v. Barker*, 407 U.S. 514 (1972), this Court determined that the evaluation of a claim of a speedy trial violation requires a balancing of the facts of each case,

considering (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) the prejudice flowing to the defendant. The length of the delay serves in part, as a "triggering mechanism." *Id.* at 330. While some delay in the prosecutorial process is unavoidable, at a certain point of the court is obliged to balance the four *Barker* factors to determine if the delay constituted a denial of a speedy trial. As the length of the delay increases, the calculus of the four factors shifts, the denial of a speedy trial becoming increasingly certain:

> Time is the most iimportant factor; the longer the delay between arrest and trial the heavier the burden on the Government will be in arguing that the right to a speedy trial has not been abridged. The defense claim has prima facie merit if the lapse between arrest and trial is longer than one year. [*United States v. Holt*, 448 F.2d 1108, 1109 (D.C. Cir. 1971)]

A proper calculation of the delay in this case thus places on the prosecution a heavy burden of demonstrating that the delay did not deprive the petitioner of his right to a speedy and public trial. The petitioner has made a *prima facie* showing on all *Barker* factors and thus a full evidentiary hearing is required.

The state has argued that the unique facts of this case justified a considerable delay in trial, that time was needed for the prosecution's circumstantial evidence to "ripen." While time is often needed to develop and gather evidence, a permissible delay easily blurs into and might even be used to justify an impermissible delay for the purposes of gaining a tactical advantage. The inquiry at this point is whether the facts of this case justify the delay of almost six years, "whether [the delay] might reasonably have been avoided—whether it was necessary." *Dickey v. Florida*, 398 U.S. 30 (1970). The

state argues that a jury could not have concluded beyond a reasonable doubt that Rosemary Calandriello had been killed until Rosemary had been missing for a considerable period of time. The state suggests that the civil law's seven year rule on the presumption of death indicates the difficulty of proving death by inference. But, could not a jury reasonably have reached the conclusion after a delay of two years? Certainly, a jury could have reached this conclusion after a delay of four years. In attempting to justify a delay of almost six years the prosecution bears a heavy burden. Evidence has been submitted to suggest that the prosecution sought to delay the trial not to allow the evidence to "ripen," but to await a more favorable time for prosecuting the offense. Affidavits have been submitted testifying that the counsel for the state admitted in oral argument before the Appellate Division of the New Jersey Superior Court that the trial was delayed in order to await a climate more favorable to trying the petitioner. The state's counsel suggested that the trial was delayed because a climate of "flower power, hippies, and runaways" would have made it difficult to find a 1969-70 jury which would have believed that Rosemary Calandriello had been murdered and had not voluntarily run away from home (Appendix G). Thus, the delay was the result of a deliberate action which was intended to secure for the state a tactical advantage over the petitioner. This purposeful delay is clearly not necessary and cannot be accepted as reasonable. *Pollard v. United States*, 352 U.S. 354, 361-62 (1957). The state has an affirmative duty to expeditiously bring cases to trial, and "where the government's lengthy delay is unexcused or purposeful, in the sense of a deliberate delay to gain tactical advantage, the government's delay is prima facie prejudicial." *United States v. Avalos*, 541 F.2d 1100, 1116 (5th Cir. 1976).

The third *Barker* factor is the defendant's assertion of the right to a speedy trial. The petitioner has fully asserted this right. The assertion of the right to a speedy trial must, like the reasons for the delay, be evaluated in the context of the unique facts of the particular case. In 1970 the petitioner successfully moved for dismissal of the abduction charge. Thereafter the petitioner was under no obligation to demand a trial on charges of murder in order to preserve his right to a speedy trial. "A person . . . who has been arrested but not indicted is under no compulsion to demand prosecution in order to preserve his right to a speedy trial, for the primary responsibility cases to trial rests on the government." *United States v. MacDonald*, 531 F.2d 196, 207 (4th Cir. 1976). Thus, upon the dismissal of the abduction charge, the petitioner had fully met his obligations in preserving his right to a speedy trial. Until the government took further action, the petitioner had no additional obligation.

Finally, the petitioner has made a prima facie showing of prejudice, the fourth consideration under *Barker*. The showing of prejudice is often difficult. The right to a speedy trial is designed to minimize a variety of prejudices and disruptions that flow from being accused in a criminal prosecution. The personal anxiety, public suspicion, and family disruption are very real, yet are also very elusive. Even specific allegations of prejudice to the defense are often difficult to prove, but may be fairly presumed by excessive delay:

> ". . . [T]here is no way of proving the prejudice to the accused which occurs outside the courtroom. '. . . the public suspicion, the severing of family and social ties, and the personal anxiety . . . prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years. [*Hoskins v. Wainwright*, 485 F.2d 1186, 1193 (5th Cir. 1973)]

In addition, a deliberate delay by the government to gain a tactical advantage is prima facie prejudicial. *United States v. Avalos, supra*, 541 F.2d at 1116. The petitioner has, however, alleged more than presumed and prima facie prejudice, and has identified a number of instances of actual prejudice to his defense. Perhaps the most important of these are the deaths and illnesses that occurred during the delay, depriving the petitioner of potential witnesses. A witness who would have corroborated the petitioner's alibi defense was unable to testify because of hospitalization for brain surgery. The death of the detective who participated in the investigation of the August 25, 1969 incident deprived the petitioner of a witness who was familar with the circumstances of an allegedly improper lineup identification. Most importantly, Morris Spritzer, petitioner's attorney at the time of the 1969 arrest, died in 1972. The death of Mr. Spritzer deprived petitioner of counsel with intimate familiarity with the facts and circumstances of the case. Mr. Spritzer's knowledge of the legal significance of certain occurrances at the lineups and preliminary hearing held on August 28, 1969, was thus lost to petitioner. It was not until after incarceration that petitioner, having begun an intensive study of law, began to recognize the importance of a number of events that occurred in 1969. For example, there was no objection in state court to the in-court identification of petitioner by four persons to whom petitioner had been exhibited in an unconstitutionally suggestive manner at a preliminary hearing. Had Mr. Spritzer, who was present at this preliminary hear-

ing, been alive at the time of petitioner's trial in 1975, objection to this tainted identification would most probably have been made.

The petitioner has thus submitted evidence of a prosecutorially generated delay of almost six years. A deliberate delay for the purpose of gaining a tactical advantage has been suggested. The petitioner's assertion of his right has been shown. Prejudice, presumed, prima facie and actual has been demonstrated. Petitioner has thus established an entitlement to a full evidentiary hearing on his claim of a denial of a speedy trial.

Point II

A conviction based on a record lacking relevant evidence on a crucial element of the offense charged violates due process.

At the conclusion of petitioner's trial the court instructed the jury on the offense of murder by lying in wait. In part, the court instructed:

> In order to commit a murder by means of lying in wait the lying in wait must be the means, method or proximate cause by which the attacker is enabled to kill his victim before the victim's escape. The killing must be accompanied by surprise and concealment and must not be disconnected from them. The evidence must show an attack from ambush upon a victim unaware of his danger and without chance to escape. The discovery of the physical presence of the aggressor is not the vital element, but the danger and lack of chance to escape are controlling (T1533-4 to 16).
>
> There must, however, be substantial evidence of long periods of waiting and watching in concealment to show a state of mind equivalent to premeditation and deliberation in order to constitute a lying in wait (T1533-23 to T1534-2).

Thereafter the jury returned a verdict of guilty of murder in the first degree. The petitioner argues that the conviction violates due process in that the record is devoid of relevant evidence of concealment, a crucial element of the offense charged.

Lying in wait requires an intent to ambush by waiting, watching, and concealment or secrecy. See *People v. Merkouris*, 46 Cal. 2d 540, 297 P.2d 999 (Sup. Ct. 1956), *Commonwealth v. Sutton*, 406 Pa. 121, 176 A.2d 679 (Pa. 1962), *State v. Brooks*, 103 Ariz. 472, 445 P.2d 831 (1968). In addition, the trial judge correctly noted that there must be a causal connection between the killing and the lying in wait; the latter must be the "means, method, or proximate cause" by which the killing is made possible or carried out.

In this case, the prosecution not only failed to produce evidence linking the alleged killing and the petitioner's concealment, the prosecution also failed to show that the petitioner did indeed conceal himself. The Appellate Division of The New Jersey Superior Court offers two arguments in rejecting petitioner's claim on this issue. First, the court proposes that "concealment of defendant's purpose to entrap the victim" satisfies the requirements of concealment. 143 N.J. Super. at 59, 362 A.2d at 623. The court is attempting to tailor the offense to fit the record, rather than determine if the record supports conviction on the offense as it is properly defined. In the single case cited by the court in support of its novel theory there was an attempt to conceal both physical presence and criminal purpose. *State v. Tansimore*, 3 N.J. 516, 537, 71 A.2d 169, 180 (1950). The prosecution has

shown no cases in which the concealment of purpose was alone sufficient to satisfy the element of secrecy required by lying in wait. In the present case there was no showing that the petitioner attempted to conceal himself or surprise the victim. *A fortiori,* there was no showing of a connection between the alleged killing and a concealment.

The Appellate Division's second argument is premised upon the definition of murder by lying in wait, under N.J. Stat. Ann. §2A:113-2, as a form of premeditated, deliberate and willful murder. The court argues that despite the lack of evidence of concealment, the jury must still have found evidence of a premeditated, deliberate and willful murder. 143 N.J. Super. at 59, 362 A.2d at 624. The jury instruction, however, was on murder by lying in wait and not on premeditated, deliberate and willful murder. The Appellate Division improperly assumed that the jury correctly found in the record evidence to support a conviction on grounds other than that urged by the prosecution and instructed by the trial judge. The court thus appears to suggest that a jury can compensate for the failures of the prosecution and correct the mistakes of the trial court. The assumption that the jury properly found evidence of an uninstructed offense is highly speculative. It is more likely that the jury was misled by the instruction. The potentially prejudicial influence of a factually unsupported instruction has been long recognized:

> The fact that the trial court gave an instruction on first degre murder when the essential elements are missing in the proof, it must be said that the jury could easily infer by the giving of such an instruction that these elements were present in the case. [*Tate v. People,* 125 Colo. 527, 541, 247 P.2d 665, 672 (Sup. Ct. 1952)]

Even though murder by lying in wait is a form of premeditated, deliberate and willful murder, an instruction on the former is not equivalent to an instruction on the latter, more general offense. This Court has held that due process requires that the prosecution prove beyond a reasonable doubt, "every fact necessary to constitute the crime" with which the defendant is charged. *In re Winship,* 397 U.S. 358, 364 (1970). *See also United States v. DiGilio,* 538 F.2d 972 (3rd. Cir. 1976), *Crosby v. Delaware,* 346 F. Supp. 213 (D. Del. 1972). This obligation cannot be avoided by delegating to the jury the responsibility of selecting, without instruction, a charge that seems to be best supported by the record.

The jury received instruction on murder by lying in wait. A crucial element of this offense was not supported by the record. "It is beyond question, of course, that a conviction based upon a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate[s] due process." *Vachon v. New Hampshire,* 414 U.S. 478 (1974). A state thus has an affirmative obligation to prove all elements of an offense charged; a conviction despite a failure to meet this obligation deprives a defendant of due process of law. The state cannot circumvent this obligation by redefining an offense to match the evidence. Neither can the state avoid this responsibility by merely assuming that the jury properly found, without guidance, an offense which is supported by the record.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

ROBERT ZARINSKY,
Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

OPINION OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY, JULY 20, 1976

Argued March 16, 1976—Decided July 20, 1976.

SYNOPSIS

Defendant was convicted before the Monmouth County Court of first-degree murder, and he appealed. The Superior Court, Appellate Division, Botter, J. A. D., held that prosecution, which was not instituted within five years from time of offense, was not barred by statute providing that no person shall be prosecuted, tried or punished for any offense not punishable with death unless indictment therefor is found within five years from time of offense; that defendant's right to speedy trial was not violated; that trial judge did not commit prejudicial error in admitting certain evidence; and that any error in charging jury on "lying in wait" was harmless.

Affirmed.

1. Criminal law §28

Capital offenses are those for which death penalty may be imposed.

2. Criminal law §145½

Statute of limitations strikes balance between right of accused to repose and right of public to prosecution of crimes, and affords protection against charges brought after events have become clouded by time so as to minimize danger of official punishment because of acts in far-distant past.

3. Criminal law §145½

While statute of limitations should be liberally interpreted in favor of repose, its application must be consonant with intent and purpose of lawgiver; it is legislative purpose which controls.

4. Criminal law §147

Legislature intended to insure that crimes of most serious class, including first-degree murder, would not escape prosecution by mere passage of time, and phrase "offense ° ° ° punishable with death" was convenient means of identifying several offenses to be included in exception for which death penalty was or would be provided in other sections of criminal code, and thus elimination of death penalty did not affect reason for prosecuting such crimes without time restriction. *N.J.S.A.* 2A:159-2.

5. Statutes §171

Unenforceability of death penalty did not wipe statute, which provides that, except as otherwise expressly provided, no person shall be prosecuted, tried or punished for any offense not punishable with death unless indictment therefor is filed within five years from time of committing offense, off the books. *N.J.S.A.* 2A:159-2.

6. Homicide §354

Imposition of death penalty for murder is not prohibited per se, but criteria for its application may render penalty unenforceable.

7. Criminal law §147

Suspending imposition of death penalty for constitutional reasons afforded no reason for frustrating legislative will by staying additional sanction against murder, namely, relentless prosecution of that crime without limitation in time, and thus statute providing that no person shall be prosecuted, tried or punished for any offense not punishable with death unless indictment therefor is filed within five years from time of committing offense did not bar prosecution in which defendant was charged with first-degree murder and which was instituted after five years from time of alleged offense. *N.J.S.A.* 2A:159-2.

8. Courts §91(1)

Defendant's contention that case was wrongly decided by Supreme Court had to be addressed to Supreme Court and not to Superior Court, Appellate Division, which was bound by Supreme Court's decision.

9. Criminal law §573

Where, since 17-year-old victim's body was never found, it was necessary for State to allow time to pass so that jury could reasonably infer she had not merely run away, defendant did not demonstrate that prior to his indictment for murder his employment was interrupted, finances drained, associations curtailed, reputation impaired or that he was subjected to anxiety by reason of threat of prosecution for murder, and defendant's claim of possible prejudice from delay was insubstantial and speculative, defendant's right to speedy trial was not violated by 5½-year delay between his arrest for contrib-

uting to delinquency of victim and his indictment for his murder. *U.S.C.A. Const.* Amend. 6; *Const.* 1947, Art. I, par. 10.

10. Criminal law §534(1)

For confession to serve as evidential basis for conviction, State must introduce independent proof of facts and circumstances which strengthen or bolster confession and tend to generate belief in its trustworthiness, plus independent proof of loss or injury.

11. Homicide §228(3)

Failure to produce victim's body did not preclude finding that she was dead.

12. Criminal law §563
Homicide §228(2)

Proof of corpus delicti, the fact of injury or, in a homicide case, of death by criminal agency, may be supplied by direct or circumstantial evidence.

13. Homicide §228(3)

Successful concealment or destruction of victim's body should not preclude prosecution of his or her killer where proof of guilt can be established beyond a reasonable doubt.

14. Criminal law §532(1)

Voir dire to determine existence of corroboration is not condition precedent to admission of a confession; if sufficient independent corroboration is not shown by all the proofs, judgment of acquittal at close of State's case is appropriate remedy. *R.* 3:18-1.

15. Criminal law §369.2(1)

In determining whether evidence that defendant previously committed crime or civil wrong on specified occasion is admissible, fundamental distinction is between evi-

dence which is relevant only to defendant's criminal disposition and that which is relevant to particular fact in issue before the jury. *Rules of Evidence*, rule 55, *N.J.S.A.*

16. Criminal law §371(1), 372(1)

Evidence of defendant's prior conduct could be admitted if relevant to establish intent, plan or motive even though defendant had been acquitted previously of criminal charges based on such conduct. *Rules of Evidence*, rule 55, *N.J.S.A.*

17. Criminal law §371(1)

In determining whether evidence that defendant previously committed crime or civil wrong on specified occasion is admissible, conduct which is insufficient to establish criminal intent toward one victim may tend to prove criminal intent toward another victim in light of other evidence. *Rules of Evidence*, rule 55, *N.J.S.A.*

18. Criminal law §369.2(4)
Witnesses §414(1)

In prosecution for first-degree murder, evidence that defendant, a 28-year-old married man, had on two previous occasions persistently tried to lure teen-age girls into his car, which evidence tended to explain how victim came to be in car of stranger, which tended to negate other hypotheses advanced for victim's disappearance, which was relevant to show defendant's presence in victim's neighborhood and which tended to corroborate identification of defendant as driver of automobile in question, was admissible even though State had previously failed to prove that such prior conduct constituted crime or civil wrong. *Rules of Evidence*, rules 4, 7(f), *N.J.S.A.*

19. Criminal law §641.2

There is no absolute right to counsel at preindictment lineup.

20. Criminal law §1169.1(5)

In prosecution for first-degree murder, any error in introducing evidence of out-of-court identifications of defendant at lineup held out of presence of defense counsel, who was allegedly notified that lineup would be held but did not appear in time and who was dead at time of trial, was not capable of producing an unjust result where both witnesses made positive in-court identifications of defendant that were not challenged by defendant.

21. Criminal law §339, 1169.1(5)

In prosecution for first-degree murder, permitting in-court identifications of defendant by four witnesses who allegedly saw victim in defendant's automobile was not reversible error where there was nothing to suggest that photographic identification procedure was impermissibly suggestive but rather uncontradicted testimony was that each witness was independently shown seven photographs and asked if he could identify driver of automobile; even assuming suggestiveness, witnesses had ample opportunity to observe defendant so that their in-court identifications were based upon their independent recollections.

22. Criminal law §404(4)

In prosecution for first-degree murder, admitting various items seized from defendant's automobile that offered circumstantial evidence of commission of crime was not error although probative weight of many items was debatable, nor was there any error in admitting victim's hairclips which were found in her pocketbook so that they could be compared with those found in automobile, although pocketbook might have been excluded.

23. Homicide §340(1)

In prosecution for first-degree murder, any error in charging jury on "lying in wait" was harmless since jury could find "lying in wait," which is merely form of pre-

meditated, deliberate and willful murder although traditionally essence of term has consisted of intent to ambush by watchful waiting, concealment and secrecy, despite fact that defendant revealed his physical presence to victim before killing. *N.J.S.A.* 2A:113-2.

24. Homicide §253(1)

Evidence was sufficient to support defendant's conviction of first-degree murder.

Before Judges KOLOVSKY, BISCHOFF and BOTTER.

Mr. Richard F. Plechner argued the case for appellant.

Mr. John T. Mullaney, Jr., Assistant Prosecutor, argued the cause for respondent (*Mr. James M. Coleman, Jr.*, Monmouth County Prosecutor, attorney).

The opinion of the Court was delivered by

BOTTER, J. A. D. Defendant was convicted in a jury trial of the first degree murder of Rosemary Calandriello (hereafter Rosemary), and the mandatory sentence of life imprisonment was imposed. *N.J.S.A.* 2A:113-4; *State v. Funicello*, 60 N.J. 60 (1972), *cert. den.* 408 U.S. 942, 92 S. Ct. 2849, 33 L.Ed.2d 766 (1972). Defendant's motion for a new trial was denied. On this appeal defendant asserts a number of grounds for reversal of his conviction. He contends that the trial court erred in denying his pretrial motions to suppress evidence seized at his home and to dismiss the indictment on two grounds—that the statute of limitations had run and defendant was denied a speedy trial. Defendant also contends that errors were committed by the trial judge in the admission of evidence and in charging the jury on first degree murder. He contends that his conviction was against the weight of the evidence

and that the verdict cannot stand in the face of the State's failure to produce the victim's body. Finding no grounds warranting reversal, we affirm.

On August 25, 1969, at about 6 P.M., Rosemary Calandriello, a 17-year-old high school student, left her home on Center Avenue in Atlantic Highlands, New Jersey, to buy milk and ice pops at two neighborhood stores. She took $2 with her and when she left she said, "I'll be right back." She was wearing a sleeveless blouse and shorts, was barefooted and carried no purse or wallet. A neighbor saw her walking down Center Avenue toward the center of town. About the same time another neighbor, Mrs. Vaughn, saw a stocky man slouched in an old, black and white Ford automobile parked near a bowling alley on Center Avenue. Shortly thereafter four boys, who were schoolmates of Rosemary, saw her riding with a stocky man, later identified as defendant, in a white Ford Galaxie with a black convertible top. She has not been seen or heard from since, and her body has never been recovered. She was promptly reported to the police as missing and they started an investigation.

Defendant's identity was determined in the following manner. On August 26 Sergeant Guzzi of the Atlantic Highlands Police Department interviewed the four boys who had seen Rosemary with defendant the night before and they furnished a description of defendant and the vehicle he was driving. Both bore distinctive features. The police learned that two days before Rosemary's disappearance a man fitting defendant's description had attempted to lure two 12-year-old girls, Lydia Hardie and Robin Spangenberg, into his car in Leonardo, a town adjacent to Atlantic Highlands. While the girls were walking down the street at about 7 P.M. a man drove up

in a white car with a black convertible roof. He offered them a ride and they refused. Lydia Hardie noted the license plate number, CTI 109. She testified that the man was heavy-set and had long, bushy sideburns and a goatee. She had never seen him before. The girls began to return home when the man approached again. At home Lydia told her mother of the incident and her mother reported it to the police and gave them the license plate number. The girls left home a short time later and the man approached them again and offered them a ride. They refused, but a short time later he returned once more and asked, "Are you sure?" The girls replied, "We're positive," and started to run away. The man said, "What bad little girls you are for not accepting my ride," and he uttered what was described as a "weird laugh."

The police discovered that a man fitting defendant's description had also attempted to lure two 14-year-old girls into his car two weeks earlier at the bowling alley on Center Avenue. The girls were Darlene Curren and Donna Johnson. Darlene testified that the man had a chubby face, long sideburns and a goatee, and she had never seen him before. At about 7 P.M. he approached them, offered them some drinks in his car and asked Donna if she wanted to drive his car. They refused and went into the bowling alley.

Sergeant Guzzi obtained the license plate number of the car the man was driving and learned that the car was registered to defendant's father, with whom defendant and his wife lived, in Linden, New Jersey. Sergeant Guzzi signed a "John Doe" complaint on August 27, 1969 charging defendant with contributing to the delinquency of Rosemary, a minor. It described defendant as "a white male, age early twenties, heavy set with a round chubby

face having long bushy sideburns and well trimmed goatee operating a white Ford Galaxy Convertible." (Defendant's correct age was 28 at the time.) In the late evening of August 27 defendant was arrested at his home in Linden and the automobile was impounded. Defendant was brought to the Monmouth County Jail around midnight. The next morning the four boys identified the vehicle and it was photographed. That same day, August 28, a lineup was held in which the four girls, Donna, Darlene, Lydia and Robin, viewed defendant. Despite the fact that defendant had shaved off his goatee and sideburns after being jailed, he was identified in the lineup as the man involved in the two incidents with these girls.

The automobile was examined pursuant to a search warrant obtained on August 29. The body of the car was in poor condition, the left rear was dented and the rear window was down. There was mud underneath the car and pieces of straw, a twig and grass were found on the lower front portion of the car. In the glove compartment were bottles of beer and blackberry brandy. The police found a .22-calibre rifle shell and a blank casing under the back seat. Hairclips were found under the right front seat and a pair of blue bikini-type panties were on the left rear floor. (There was testimony that Rosemary had worn hairclips and panties of this type, but these items were not identified as actually belonging to her.) In the trunk were found a chrome-plated hatchet and a ball peen hammer with a hair fiber on its flat face. Scrapings taken from the right rear bumper and right taillight rim proved upon analysis to be blood.

The door and window handles on the passenger side of the vehicle had been removed and were found under the right front seat. The door and window worked properly

when the handles were attached, but the holding locks on these handles had been removed. Without a handle the door on the passenger's side could not be opened from the inside, but the door and window handles on the driver's side were intact.

The initial complaint against defendant was amended on August 28 to charge defendant with abduction of Rosemary for an immoral purpose. *N.J.S.A.* 2A:86-3. Defendant was released on bail on August 28, 1969. Thereafter, in November 1969, defendant was indicted and arrested for attempted kidnapping or enticing a child away from parents (*N.J.S.A.* 2A:118-2) in connection with the incident involving the two 12-year-old girls, Lydia and Robin. He was held at the Monmouth County Jail from November 22, 1969 until December 19, 1969, when he was released on bail. During this time his jailmates included Herbert L. Williams, John Gosch and Al Glover.

In December 1969 defendant was also indicted in connection with the August 9, 1969 incident involving the 14-year-old girls, Darlene and Donna. The crimes charged were an attempt to entice a child "within the age of 14 years" to leave her father or mother, contrary to *N.J.S.A.* 2A:118-2, and an attempt to impair the morals of a minor by offering the minor alcoholic beverages, allegedly in violation of *N.J.S.A.* 2A:96-3.

In March 1970 defendant was tried on the indictment involving the 12-year-old girls, but the case was dismissed by the trial judge at the close of the State's proofs. In the subsequent trial involving the 14-year-old girls, defendant was convicted of attempting to commit the alleged crimes. However, on appeal, this court in February 1971 set aside the convictions on the ground that the proofs did not support the charges. In the meantime, in June 1970,

the complaint charging abduction of Rosemary was dismissed by the trial court on defendant's motion pursuant to *R.* 3:25-3 for unnecessary delay in presenting the charge to a grand jury. A consent order was also entered returning the impounded vehicle to defendant's father.

Although no charges were pending after June 1970, investigations involving defendant continued. Warrants were issued in February 1975 for the search of defendant's residence and vehicles, supported by affidavits asserting that defendant was a suspect in the deaths of Rosemary and of 17-year-old Linda Balabanow in 1969, and teenagers Joanne Delardo and Doreen Carlucci in December 1974. Linda Balabanow had worked at a drug store two blocks from defendant's home. She was last seen when she left the store on March 26, 1969, and her body, to which an eight-foot truck tire chain was attached, was recovered from the Raritan River in Woodbridge Township on April 27, 1969. She had been brutally beaten and was killed before her body entered the water. A piece of electrical wire was found knotted around her broken neck. In January 1972 Sergeant Guzzi was advised that federal authorities had matched a hair sample from the Balabanow girl with the hair fiber found on the ball peen hammer taken from the trunk of defendant's car in the investigation of Rosemary's death.

Similarities were not noted between the death of the Balabanow girl and the deaths of the Delardo and Carlucci girls of Woodbridge Township, who were together when last seen alive on December 27 in Manalapan Township. Both girls had been strangled, and knotted electrical wire was found on Joanne Delardo's neck. The Balabanow and Delardo bodies were nude from the waist down, and Carlucci's body was almost entirely nude. Their missing

clothing was never found. The preserved state of Delardo's and Carlucci's bodies led police to suspect that they had been stored in cool temperature for more than a week before being deposited in Manalapan. Defendant had an insulated truck which he and his father used in their produce business which could have been used for this purpose. However, the searches conducted on February 21, 1975 for evidence of these crimes were not productive so far as the record before us shows.

On February 20, 1975 defendant was indicted for the murder of Rosemary Calandriello. His pretrial motions to dismiss the indictment for untimeliness were denied, and his motion to suppress evidence seized in the February 1975 searches were also denied. Trial commenced on April 7, 1975.

As indicated above, the evidence offered by the State probative of defendant's guilt was largely circumstantial. There was extensive evidence linking defendant to Rosemary's disappearance. Two of the girls testified to the August 9 and August 23 incidents in which defendant tried to entice them into his automobile and they made positive in-court identifications of defendant. The four boys who observed Rosemary in defendant's car when she was last seen also testified and made positive in-court identifications of defendant. Theirs was not merely casual observations of Rosemary and defendant. They were approaching the intersection of Center Avenue and Avenue A in Atlantic Highlands when they observed defendant's automobile coming toward them. The vehicle turned left in front of them and they followed it at a slow pace for about five minutes. Each testified that he was able to get a good view of Rosemary and defendant, and one estimated he had a front view of defendant's face for 10 to 12 seconds. They were surprised to see Rosemary in defend-

ant's automobile, for Rosemary had no boyfriends to their knowledge.

There was much evidence to show that it was out of character for Rosemary to be in a stranger's car. She was a shy, quiet and obedient girl who got along well at home and was never known to have hitchhiked. Rosemary had gone out with one boy several times, beginning in July 1969, but only on a double date. There was no evidence offered to suggest that Rosemary had voluntarily run away from home, yet she was never seen or heard from after riding in defendant's car. By stipulation it was proved that the following government agencies had no contact with Rosemary since August 25, 1969: the Social Security Administration, Internal Revenue Service, United States Post Office, Atlantic Highlands Board of Health, New Jersey Division of Motor Vehicles and New Jersey Unemployment Bureau.

Finally, three of defendant's jailmates, John Gosch, Herbert L. Williams and Al Glover, testified to statements made by defendant while in the Monmouth County Jail. Defendant implicated himself in Rosemary's murder in talking with Gosch (saying, "They'll never find that stinking broad") and, in an angry outburst, defendant admitted to Williams and Glover that he had thrown Rosemary's body, loaded with weights, into a river. Williams also testified that defendant alluded to various details of the case. Defendant explained that the inside door handles of his car were removed so that girls could not get out, and he said that he could claim that a pair of panties, found by the police in his car, were his wife's. There was also evidence that shortly before his arrest defendant was observed leaning over the open trunk of the Ford automobile with a scrub brush in his hand and a plastic pail beside him. Despite this suggestion that defendant was

cleaning a portion of the vehicle, it was found generally in an unclean and untidy condition.

Defendant did not testify. Various witnesses, including his wife, mother and father and several aunts and uncles, testified that defendant was at home in Linden, New Jersey throughout the evening of August 25, 1969. However, the State was able to contradict the testimony of defendant's wife, mother and father. Defendant's father claimed he had been watching television during the evening and defendant's wife claimed she was at home. However, when questioned the day after defendant's arrest his father had said nothing about watching television; rather, he told the police he went to sleep at 5:30 P.M. At the same time defendant's mother had stated that defendant's wife had accompanied her to her weekly bingo game on the night of Rosemary's disappearance.

The defense also attempted to counter the State's evidence in other respects. Defendant's wife explained that the handles in the car had been removed in an effort to repair a jammed window, that defendant was never able to install them securely and, therefore, they were kept under the seat. She also testified that the blue panties found in the car were hers, as were the hair clips. An explanation was also offered for the blood on the rear of the car: the brother of defendant's wife attempted to repair the taillight three weeks earlier and had cut his hand.

Despite this testimony the jury found defendant guilty.

I

We consider, first, whether defendant's prosecution is barred by *N.J.S.A.* 2A:159-2. that provision states:

> Except as other wise expressly provided by law no person shall be prosecuted, tried or punished for *any of-*

fense not punishable with death, unless the indictment therefor shall be found within five years from the time of committing the offense or incurring the fine of forfeiture. This section shall not apply to any person fleeing from justice [Emphasis supplied].

Defendant argues that because the death penalty can no longer be imposed under our existing statutes (*State v. Funicello, supra*) he was not accused of a crime "punishable with death." Therefore, he reasons, this prosecution must be barred because it was not instituted within five years from the time of the offense.

[1] Defendant places primary reliance on *State v. Johnson,* 61 N.J. 351 (1972), which held that subsequent to *Funicello* an individual charged with first degree murder was bailable before conviction because murder was no longer a capital offense. However, we do not find *Johnson* persuasive on the issue before us. In *Johnson* the court was concerned with the right to bail. *N.J. Const.* (1947), Art. I, par. 11, provides that all persons are entitled to bail before conviction "except for capital offenses when the proof is evident or presumption great." Capital offenses are those for which the death penalty may be imposed. *State v. Johnson, supra,* 61 N.J. at 355; *State v. Williams,* 30 N.J. 105, 125 (1959).

The court in *Johnson* examined the policies underlying the right to bail. Noting that the concept of pretrial release reflects "the everpresent presumption of innocence," the court said that the inclusion of the words "except for capital offenses" struck a balance:

> The underlying motive for denying bail in capital cases was to secure the accused's presence at the trial. In a choice between hazarding his life before a jury and forfeiting his or his suretie's property, the framers ° ° ° felt that an accused would probably prefer the latter. But when life was not at stake and consequently the strong flight-urge was not present, the framers obviously regarded the right to bail as imperatively present [61 N.J. at 360].

Once the threat of death and its strong inducement for flight were removed the court found that there was no longer any justification for denying bail to persons accused of crimes which had been designated by the Legislature as capital offenses.

[2] A statute of limitations strikes a balance between the right of the accused to repose and the right of the public to the prosecution of crimes. It affords protection against charges brought after events have become clouded by time, "to minimize the danger of official punishment because of acts in the far-distant past." *Touissie v. United States,* 397 U.S. 112, 114-115, 90 S. Ct. 858, 860, 25 L.Ed.2d 156, 161 (1970). For most crimes there is an absolute bar to prosecution after a specified period. In *re Pillo,* 11 N.J. 8, 18 (1952); *Moore v. State,* 43 N.J.L. 203, 209 (E. & A. 1881). However, the Legislature made an exception for crimes "punishable with death." These extremely serious crimes were never to be insulated by time.

Since it was enacted in 1796 our statute of limitations has excepted the crime of murder for which the legislature prescribed the death penalty. Pat. L. 1796, p. 208, §73 (An Act for the punishment of crimes); L. 1879, c. CI, §1 at 183; L. 1898 c. 237, §152 at 919; L. 1953, c. 204 §1 (*N.J.S.A.* 2A: 159-2). (The unlimited time in which to prosecute murder was extended in 1898 to all crimes "punishable by death," except for treason. L. 1898, c. 237, §152.) Thus, throughout our history the legislature has pursued two sanctions for first degree murder: (1) that its perpetrator may suffer the death penalty and (2) that

the crime would not go unpunished because of the lapse of time between the murder and the indictment.

[3, 4] While a statute of limitations should be liberally interpreted in favor of repose, its application must be consonant with the intent and purpose of the lawgiver. It is the legislative purpose which controls. *State v. Brown*, 22 N.J. 405, 415-416 (1956). Clearly, the Legislature intended to ensure that crimes of the most serious class, including first degree murder, would not escape prosecution by the mere passage of time. The phrase "offense * * * punishable with death" was a convenient means of identifying the several offenses to be included in the exception for which the death penalty was or would be provided in other sections of the criminal code. See *N.J.S.A.* 2A:113-2 and *N.J.S.A.* 2A:113-4 (first degree murder); *N.J.S.A.* 2A:118-1 (kidnapping for ransom); *N.J.S.A.* 2A:148-6 (assault with intent to kill the President, a state governor or other high executive officers) and *N.J.S.A.* 2A:148-1 (Treason; but note the three-year statute of limitations for treason in *N.J.S.A.* 2A:159-1). The fact that the death penalty cannot be carried out, for constitutional reasons, does not change this identification and purpose. Unlike *Johnson*, the elimination of the death penalty has not affected the reason for prosecuting these crimes without time restriction. Their heinous nature remains.

[5-8] The unenforceability of the death penalty has not wiped the statute off the books. See *Dwyer v. Volmar Trucking Corp.*, 105 N.J.L. 518, 520 (Sup. Ct. 1929). Imposition of the death penalty for murder is not prohibited *per se*, but the criteria for its application may render the penalty unenforceable. See *Gregg v. Georgia*, — U.S. —, 96 S. Ct. 2909, 48 L.Ed.2d —, 44 U.S.L.W. 5230 (1976). The constitutional basis for suspending the application of the death penalty—to avoid an excessive, inappropriate or cruel and inhuman punishment or its arbitrary and capricious application (see *id.*)—are unrelated to the purposes of our statute of limitations. It is one thing to suspend the imposition of the death penalty for constitutional reasons, but this affords no reason for frustrating the legislative will by staying its additional sanction against murder, namely, the relentless prosecution of that crime without limitation in time. Thus, we conclude that *N.J.S.A.* 2A:159-2 does not bar this prosecution.[1]

II

[9] Defendant next contends that his right to a speedy trial, protected by the Sixth Amendment to the United States Constitution,[2] was violated. A 5½-year period separated defendant's arrest for contributing to the delinquency of Rosemary Calandriello and his indictment for her murder. Nevertheless, in the circumstances of this case, we hold that defendant's right to a speedy trial was not violated.

In reaching this decision we have considered the various factors referred to in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972), and *State v. Szima*, 70 N.J. 196, 358 A.2d 773 (1976). These are the length of delay, the reason for delay, whether defendant asserted the right and the degree of preudice to defendant.

The State offers a reasonable explanation for the delay in this case. Because Rosemary's body was never found the State was forced to prove her death by circumstantial

1. We note defendant's further argument that *State v. Brown, supra*, was wrongly decided by our Supreme Court. There a conviction for second degree murder was upheld where the indictment charging first degree murder was returned more than five years after commission of the crime. Defendant's contention may be addressed to the Supreme Court, not this court, since we are bound by that decision. *State v. Steffanelli*, 133 N.J. Super. 512, 514 (App. Div. 1975). In any event, it is irrelevant where the accused is found guility of first regree murder.

2. The Sixth Amendment right to speedy trial is applicable to the states. *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). The right is also protected by N.J. Const. (1947), Art. 1, par. 10.

evidence. In order to do this convincingly it was necessary to allow time to pass so that a jury could reasonably infer that she had not merely run away. Moreover, it was not unreasonable for the State to hope that more positive evidence would be found before trying defendant for this ultimate crime.

Defendant was first arrested in connection with Rosemary's disappearance in August 1969, but charges of abduction were dropped in June 1970. He was released on bail promptly after his arrest in August 1969. He has not demonstrated that prior to his indictment for murder his employment was interrupted, his finances drained, his associations curtailed, his reputation impaired, or that he, his family and friends were subjected to anxiety by reason of the threat of prosecution for murder. These considerations were identified in *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L.Ed.2d 468, 478 (1971), as the "substantial underpinnings" of the right to speedy trial. *Cf. State v. Smith*, 131 N.J. Super. 354. 369 (App. Div. 1974), *aff'd o.b.* 70 N.J. 213 (May 17, 1976); *United States v. MacDonald*, 531 F.2d 196 (4 Cir. 1976).

Prejudice to a defense due to inordinate delay in prosecution is, of course, a serious consideration. However, we find no reason on this account to invalidate defendant's conviction. There is nothing in the record to indicate that his defense was unduly impaired. See *Barker v. Wingo*, *supra*, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L.Ed.2d at 118. Defendant's alibi witnesses testified they had a clear memory that defendant was home on the night in question. See *id.* at 532, 92 S. Ct. at 2193, 33 L.Ed.2d at 118. The original, early charge of abduction had served to stimulate defendant's preparation of a defense against criminal involvement with Rosemary. Thus, defendant's claim of possible prejudice is "insubstantial" and "speculative." *United States v. Ewell*, 383 U.S. 116, 122, 86 S. Ct. 773, 777, 15 L.Ed.2d 627, 632 (1966); *cf. United States v. Mann*, 291 F. Supp. 268 (S.D.N.Y. 1968) (cited with approval in *Barker v. Wingo, supra*).

Defendant contends that he was prejudiced by reason of the death of his first attorney, Morris Spritzer, whose testimony would have been helpful on the *voir dire* as to the admissibility of the lineup evidence. The record shows that Spritzer represented defendant in an application for reduction of bail on November 24, 1969 in connection with the indictment pertaining to the 12-year-old girls. Shortly thereafter, on December 11, 1969, defendant's present attorney appeared for defendant in that cause and he has continued to represent defendant on all charges involving Rosemary and the four other young girls. Defendant contends that he was deprived of his right to Spritzer's counsel at the August 28, 1969 lineup identification. However, for reasons indicated below, we conclude that the loss of Spritzer's testimony was immaterial, since the denial of defendant's right to counsel, even if it occurred, was harmless error.

We also find no prejudice in the loss of other potential evidence claimed by defendant. For example, the Ford Galaxie, which was ordered returned to defendant's father in May, 1970, was destroyed in April 1973 as valueless. However, photographs of the vehicle were taken in August 1969 and were marked in evidence at the trial. The car was available to defendant before the charge of abducting Rosemary had been dismissed, and defendant has not shown what proof he lost by its unavailability at the time of trial.

Defendant contends that his motion for dismissal of the charges against him for Rosemary's abduction was tantamount to a request for speedy trial.[3] *Cf. State v. Smith,*

3. There is no merit to defendant's collateral estoppel claim that dismissal of the abduction charges bars the State from asserting that defendant was not prejudiced by the delay. See *State v. Redinger*, 64 N.J. 41, 45-46 (1973).

supra, 131 N.J. Super., at 363-367. Nevertheless, viewing the record as a whole, we have no doubt that defendant suffered no constitutional wrong by the passage of time before he was indicted for murder.

III

We reject, also, defendants contentions that the trial judge commited prejudicial error in admitting certain evidence.

[10] W find no error in the judge's refusal to exclude defendant's admissions of culpability to Gosch, Williams and Glover. For a confession to serve as an evidential basis for conviction "the State must introduce independent proof of facts and circumstances which strengthen or bolster the confession and tend to generate a belief in its trustworthiness, plus independent proof of loss or injury * * *." *State v. Lucas*, 30 N.J. 37, 56 (1959). We find that the State has met this burden.

[11-13] There was ample independent circumstantial proof to give credence to defendant's admissions. The failure to produce the victim's body does not preclude a finding that she is dead. *Commonwealth v. Burns*, 409 Pa. 619, 629-33, 187 A.2d 552, 558-559 (Sup. Ct. 1963); *State v. Dudley*, 19 Ohio App.2d 14, 20, 249 N.E.2d 536, 541 (Ct. App. 1969). Proof of the *corpus delicti*—the fact of injury or, in a homicide case, of death, by a criminal agency—may be supplied by direct or circumstantial evidence. *Commonwealth v. Burns, supra; State v. Dudley, supra; Campbell v. People*, 159 Ill. 9, 42 N.E. 123 (Sup. Ct. 1895) (miscited by defendant as support for his position); *People v. Corrales*, 34 Cal.2d 426, 210 P.2d 843 (Sup. Ct. 1949); *cf. United States v. DiOrio*, 150 F.2d 938, 941 (3 Cir.), *cert. den.* 326 U.S. 771, 66 S. Ct. 175, 90 L.Ed. 465 (1945). *Contra, Ruloff v. People*, 18 N.Y. 179 (Ct. App. 1858), cited by defendant, and *N.Y. Penal Law of 1909*, §1041. But L. 1965, c. 1046, §2, effective Sept. 1, 1967 (*N.Y. Penal Code* §500.05 (McKinney 1967), repealed the 1909 statute. New York law now bars a conviction based solely on a confession unless there is "additional proof that the offense charged has been committed." *N.Y. Crim. Proc. L.* §60.50 (L. 1970, c. 996, §1, effective Sept. 1, 1971). See *People v. Jennings*, 40 A.D.2d 357, 340 N.Y.S.2d 25 (App. Div.), *aff'd* o.b. 33 N.Y.2d 880, 352 N.Y.S. 444, 307 N.E.2d 561 (Ct. App. 1973); *cf. People v. Daniels*, 37 N.Y.2d 624, 376 N.Y.S.2d 436, 339 N.E.2d 139 (Ct. App. 1975). Surely, the successful concealment or destruction of the victim's body should not preclude prosecution of his or her killer where proof of guilt can be established beyond a reasonable doubt. *Campbell v. People, supra*, 159 Ill. at 22, 42 N.E. at 127.

[14] Contrary to defendant's contention, a *voir dire* to determine the existence of corroboration is not a condition precedent to the admission of a confession. If sufficient independent corroboration is not shown by all the proofs, a judgment of acquittal at the close of the State's case is the appropriate remedy. *R.* 3:18-1.

[15-17] Defendant next contends the trial judge erred in admitting the testimony of Lydia Hardie and Darlene Curren as to defendant's attempts to entice them into his car. We disagree.

Evid. R. 55 provides:

> Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed a crime or civil wrong on another speci-

fied occasion but, subject to Rule 48, such evidence is admissible to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident.

The fundamental distinction is between evidence which is relevant only to a defendant's "criminal disposition" and that which is relevant to a particular fact in issue before the jury. *State v. Wright*, 66 N.J. 466 (1975), adopting dissenting opinion, 132 N.J. Super. 130, 148 (App. Div. 1974). Evidence of defendant's prior conduct may be admitted if relevant to establish intent, plan or motive (see *State v. Sinnott*, 24 N.J. 408, 413-414 (1957) even though defendant had been acquitted previously of criminal charges based upon such conduct. *State v. Slocum*, 130 N.J. Super. 358, 363 (App. Div. 1974). Conduct which is insufficient to establish a criminal intent toward one victim may tend to prove a criminal intent toward another victim in the light of other evidence.

[18] Defendant contends that the State's failure to prove that his prior conduct was a crime or civil wrong prevents admisison of this evidence. This contention misses the point. If the prior conduct is not a crime or civil wrong, but is relevant it is admissible. *Evid. R.* 7(f) provides that "all relevant evidence is admissible" unless excluded under some other rule of evidence. Here we find no abuse of discretion in the failure to exclude this evidence under *Evid. R.* 4 because of its potential for prejudice.

In this case evidence that defendant, a 28-year-old married man, had on two previous occasions persistently tried to lure teenage girls into his car would tend to explain how Rosemary came to be in the car of this stranger. See *State v. Wright, supra.* It tends to negate other hypotheses advanced by defendant for Rosemary's disappearance, namely, voluntary flight, suicide or accident.

We also agree with the trial judge's observation that the evidence was relvant to show defendant's presence in the victim's neighborhood, despite his residence in another county, and it tended to corroborate the identification of defendant as the driver of the automobile.[4]

[19] Similarly, we reject defendant's argument that admission into evidence of the out-of-court identifications of defendant by Lydia Hardie and Darlene Curren was reversible error. The identification of defendant as the man who tried to lure the girls into his automobile was made at a lineup on August 28, 1969, one day after defendant was arrested in connection with Rosemary Calandriello's disappearance. There is no absolute right to counsel at a pre-indictment lineup. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972); *State v. Earle*, 60 N.J. 550, 552 (1972). Defendant argues, however, that because the police knew he had retained counsel and held the lineup out of counsel's presence, the identifications were inadmissible. See *State v. Wilbely*, 112 N.J. Super. 216, 219 (App. Div. 1970).

[20] At the *voir dire* held to determine the admissibility of this evidence there was testimony that the police did notify counsel that the lineup would be held, but that he did not appear in time. Counsel was dead at the time of this trial and no explanation was given for his absence from the lineup.[5] In any case, both witnesses made posi-

4. Defendant's assertion that the trial judge did not caution the jury as to the proper consideration of this evidence (*Evid. R.* 6) is directly contradicted by the transcript of the judge's charge to the jury. Morevor the judge did not abuse his discretion in refusing to give a limiting instruction after the prosecutor's summation but before the jury was excused for the day. Finally, there is no merit to the complaint that the prosecutor committed prejudicial error in referring to this evidence in his summation. See *State v. Slobodian*, 120 N.J. Super. 68, 75 (App. Div.), certif. den 62 N.J. 77 (1972).

5. The trial judge made no finding as to who was responsible for counsel's absence, reasoning that defendant had no right to cousel under *Kirby v. Illinois* and *State v. Earle, supra.*

tive in-court identifications of defendant, which are not challenged by defendant. Thus, even if there was error, we are satisfied beyond a reasonable doubt that introduction of this evidence was not "clearly capable of producing an unjust result." *R.* 2:10-2; *Chapman v. California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 827-828, 17 L.Ed.2d 705, 710 (1967); *State v. Macon*, 57 N.J. 325, 336-341 (1971).

[21] Further, the trial judge did not err in permitting in-court identifications of defendant by the four witnesses who saw Rosemary in defendant's automobile. The judge had previously ruled that their identifications of defendant's photograph should not be presented to the jury because the State had failed to properly preserve evidence of the photographic identification. See *State v. Brown*, 99 N.J. Super. 22, 27-28 (App. Div.), *certif. den.* 51 N.J. 468 (1968). However, there is nothing in the record to support defendant's contention that the procedure was impermissibly suggestive. On the contrary, the uncontradicted testimony was that each witness was independently shown seven photographs and asked if he could identify the driver of the automobile.

Assuming, *arguendo*, there was suggestiveness in the procedure, it was clear that the boys had ample opportunity to observe defendant. Thus, we have no doubt that the trial court correctly concluded that these in-court identifications were based upon their independent recollections. See *Simmons v. United States*, 390 U.S. 377, 384-386, 88 S. Ct. 967, 971-72, 19 L.Ed.2d 1247, 1253-1254 (1968); *State v. Thompson*, 59 N.J. 396, 418-419 (1971); *cf. Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2 401 (1972).

[22] We find no error in admitting into evidence various items seized from defendant's automobile which offered

circumstantial evidence of the commission of the crime, although the probative weight of many items was debatable. *State v. Wade*, 89 N.J. Super. 139, 145 (App. Div. 1965); *cf. State v. Mayberry*, 52 N.J. 413, 435-436 (1968), *cert. den.* 393 U.S. 1043, 89 S. Ct. 673, 21 L.Ed.2d 593 (1969). The trial judge did not err in concluding that the State had met its burden in establishing the chain of possession of the items. See *State v. DiCarlo*, 67 N.J. 321, 329 (1975); *State v. Brown, supra*, 99 N.J. at 27. Nor was there error in the admission of hairclips used by Rosemary which had been found in her pocketbook, so that they could be compared with those found in the car. While the pocketbook might have been excluded, this claimed error could not justify setting aside the verdict.

We find defendant's remaining contentions lacking in merit.

[23] N.J.S.A. 2A:113-2 defines murder "perpetrated by means of poison, or by lying in wait, or by any *other* kind of willful, deliberate and premeditated killing" [emphasis supplied] as murder in the first degree. That the trial judge charged "lying in wait" was not reversible error in the circumstances of this case.

The State contends that defendant's course of conduct, reasonably inferable from the evidence, was tantamount to concealment within the meaning of the law. The removal of the door and window handles, for example, evidences concealment of defendant's purpose to entrap the victim. See *State v. Tansimore*, 3 N.J. 516, 537 (1950). A jury could find "lying in wait" despite the fact that an accused has revealed his physical presence to the victim immediately before the killing. *Id.* Traditionally, however, an intent to ambush by watchful waiting, concealment and secrecy is the essence of the term. *People v. Merkouris*,

46 Cal.2d 540, 297 P.2d 999 (Sup. Ct. 1956). However, a killing by "lying in wait" is merely a form of premeditated, deliberate and willful murder. See N.J.S.A. 2A:113-2. Here, the jury must have found defendant guilty of a deliberate, premeditated and willful murder. Thus we are satisfied that in the circumstances of this case the jury could not have been misled by the charge and, if there was error, it was harmless beyond a reasonable doubt. See *Commonwealth v. Mondollo*, 247 Pa. 526, 93 A. 612 (Sup. Ct. 1915); *cf. Turner v. United States*, 396 U.S. 398, 420, n. 41, 90 S. Ct. 642, 654, n. 41, 24 L.Ed.2d 610, 625, n. 41 (1970).

Defendant also contends that the search warrants issued in 1975 were not supported by affidavits establishing probable cause to believe that defendant was guilty of any of the murders for which evidence was sought. We disagree. Nor was it unreasonable to believe that evidence of such crimes may have been concealed in defendant's home or vehicles. Moreover, not only has defendant failed to demonstrate any prejudice resulting from the searches, he has not even asserted that any of the seized items were admitted in evidence.

[24] Finally, we find no merit to defendant's assertion that his conviction was against the weight of the evidence. A motion for a new trial on this ground was denied. We are satisfied that "the evidence, viewed in its entirety including the legitimate inferences therefrom [was] sufficient to enable a jury to find that the State's charge [was] established beyond a reasonable doubt." *State v. Mayberry, supra*, 52 N.J. at 436-437. Thus, we have no doubt that defendant's conviction was not a "manifest denial of justice under the law." *State v. Sims*, 65 N.J. 359, 374 (1974).

Affirmed.

APPENDIX B

ORDER OF THE SUPREME COURT OF NEW JERSEY, NOVEMBER 9, 1976

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is granted solely as to the issue of whether prosecution of defendant is barred by the statute of limitations (N.J. S.A. 2A:159-2.)

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 9th day of November, 1976.

/s/ Florence R. Peskoe
Clerk

FILED—Nov. 9, 1976

/s/ Florence R. Peskoe
Clerk

A TRUE COPY

/s/ Florence R. Peskoe
Clerk

APPENDIX C

ORDER OF THE SUPREME COURT OF NEW JERSEY, MARCH 1, 1977

This matter having been duly presented to the Court, it is ORDERED that the motion for a reconsideration of the limitation of the grant of certification is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 1st day of March, 1977.

/s/ Florence R. Peskoe
Clerk

FILED–Mar. 1, 1977

/s/ Florence R. Peskoe
Clerk

A TRUE COPY

/s/ Florence R. Peskoe
Clerk

APPENDIX D

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE, MAY 30, 1978

Robert Zarinsky, presently serving a life term at the Rahway State Prison for murder,[1] seeks habeas corpus relief under 28 U.S.C. §2241 *et seq.* Petitioner raises a number of issues as to all of which State remedies have been exhausted. 28 U.S.C. §2254(b). *Picard v. Connor,* 404 U.S. 270 (1971).

On August 27, 1969 petitioner was arrested in connection with the disappearance of Rosemary Galandriello who had been last seen on August 25, 1969 in his company.[2] On August 28, 1969 petitioner was charged with having abducted Miss Galandriello for an immoral purpose.[3] No action having been taken on that complaint, petitioner successfully moved to dismiss it on May 29, 1970. Approximately four years and nine months later, February 20, 1975, petitioner was indicted for the murder of Miss Galandriello.[4] He was arrested the following day, trial began on April 7, 1975 and on April 23, 1975, the jury returned a verdict of guilty. Direct appeal was unavailing.

Petitioner first contends that he has been denied a speedy trial[5] and must therefore be released. *Strunk v. United States,* 412 U.S. 434, 440 (1973); *Barker v. Wingo,* 407 U.S. 514, 522 (1972). To resolve this contention we look to *Barker* at 530 which requires us to balance these four factors: Length of delay, the reason therefor, the defend-

1. *N.J.S.* 2A:113-2.

2. This complaint charged John Doe with contributing to the delinquency of a minor. *N.J.S.* 2A:96-4.

3. *N.J.S.* 2A:86-3

4. Monmouth County Indictment No. 586-74.

5. The Sixth Amendment right to a speedy trial is applicable to the states. *Klopfer v. North Carolina,* 386 U.S. 213 (1967).

ant's assertion of his right and prejudice to him. Considering the first of these factors the *Barker* Court said:

> "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id* at 530.

Petitioner contends that his trial for murder was delayed from August 28, 1969 when he was charged by complaint with abduction, until April 7, 1975 when trial was begun. Recognizing that abduction and murder are different offenses, petitioner argues that in the instant context they are identical because at trial the State relied solely on evidence obtained in its investigation of the abduction complaint.

In *United States v. Marion*, 404 U.S. 307 (1971), relied upon by the petitioner, the Court said that,

> "it is either a formal indictment or information or else the actual restraint imposed by arrest and holding to answer a criminal charge that engage the speedy trial provisions of the Sixth Amendment.
> "Invocation of the speedy trial provisions thus need not await indictment, information or other formal charge." *Id.* at 320-321.

In *Marion* the defendants, indicted for fraudulent business practices, were arrested approximately three years after the government had concluded its investigation.[6] In

6. To support his contention that the delay here is 5½ years, petitioner points to *United States v. Booz*, 451 F.2d 719, 726(3 Cir. 1971). In that case the Court found that trial had not commenced "until January of 1971, 29 months after indictment and 45 months after the robbery [a timeable it characterized as] a serious delay." *Booz* was decided on November 17, 1971. On December 20, 1971, *United States v. Marion*, 404 U.S. 307 (1971), was decided. Under *Marion* the time to be calculated on a speedy trial issue runs not from the commission of the crime but from either the charge, whether by indictment or information, or the arrest.

rejecting speedy trial claims, the Court refused "to extend the reach of [that entitlement] to the period prior to arrest," 404 U.S. at 321, because not until then did defendants become susceptible to the evils which the right is designed to prevent.[7]

For *Marion* to serve petitioner requires acceptance of petitioner's contention that the murder prosecution began with his arrest for abduction and continued until trial. It is nevertheless apparent that petitioner was not susceptible to the evils described in *Marion* from May 29, 1970 when the abduction complaint was dismissed until February 21, 1975 when he was arrested on the murder indictment[8] which had been returned the previous day.

The Sixth Amendment right to a speedy trial protects an accused from undue delay in the prosecution of a pending charge. It does not protect from undue delay in the filing of that charge.[9] That function is served by statutes of limitations and the Due Process Clause of the Fifth Amendment. The Supreme Court of New Jersey has heretofore held petitioner's prosecution not barred by the rele-

7. These include undue and oppressive incarceration prior to trial, anxiety and concern accompanying public accusation, disruption of employment and family life, drain on finances, and public obloquy. 404 U.S. at 320.

8. In *Hoffa v. United States*, 385 U.S. 293 (1966), the Court stated, "There is no Constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Id.* at 310.

9. *Cf. Dillingham v. United States*, 423 U.S. 64 (1975), in which a 22 month pre-indictment delay was included in the length of delay of petitioner's trial. In that case petitioner had been arrested 22 months prior to the indictment. Following *United States v. Marion, supra*, the Court found petitioner to be an "accused" upon arrest. In the instant case petitioner was neither arrested nor indicted between May 29, 1970 and February 20, 1975 and therefore was not then an "accused."

vant statute of limitations.[10] Given the nature of the State's case and its desire for the passage of time to permit the jury to decide whether Miss Calandriello had run away or had died,[11] we see no denial of due process here[12] and conclude that the time between the dismissal of the abduction charges, May 29, 1970, and petitioner's arrest for murder, February 21, 1975, is not to be included in computing the length of delay suffered by him. *United States v. Marion, supra. See also United States v. Martin,* 543 F.2d 577 (6 Cir. 1976), c.d. 429 U.S. 1050 (1977), in which the Court held that in the absence betwtween January 1973 and December 1974, of an indictment on which the defendant could have been tried, there had been no delay of a speedy trial. In that case the defendant was indicted in December 1974 on charges which had been dismissed in January 1973.

By the *Barker* standard and putting aside that abduction and murder are different in kind, petitioner's trial was delayed at most from August 28, 1969 when he was arrested on the abduction complaint, to May 29, 1970 when that charge was dismissed and from February 20, 1975 the date of the indictment, to April 7, 1975 when trial began,

10. *State v. Zarinsky,* 75 N.J. 101 (1977).

11. At trial petitioner's attorney contended that Rosemary Calandriello had run away and did not wish to be found. It was to meet that contention and "to allow all the inferences that the State could demonstrate from the victim's character to ripen and to prove beyond a reasonable doubt that Rosemary Calandriello was dead" that petitioner was not indicted until February 20, 1975.

12. In *United States v. Lovasco,* 431 U.S. 783 (1977), the Court was required

> "to determine . . . whether . . . compelling respondent to stand trial after the Government delayed indictment to investigate further—violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' *Mooney v. Holohan,* 294 U.S. 103, 112 (1935), and which define 'the community's sense of fair play and decency.' *Rochin v. California,* [432 U.S. 165, 173 (1952)]."

In finding such a delay not unconstitutional the Court held,

> "that to prosecute a defendant following investigative delay does not deprive him of due process even if his defense might have been somewhat prejudiced by the lapse of time."

or less than 11 months—a delay on its face not "presumptively prejudicial" given the circumstancial nature of the prosecution's case. Some cases take more time to ripen than others. See *Barker* in which the Court found no speedy trial denial although the delay was five years. *Id.* at 530-531.

The absence of a presumptively prejudicial delay makes unnecessary inquiry into the remaining three factors described in *Barker* at 530. We note nevertheless that the reason for the delay was to strengthen the circumstancial nature of the prosecution's case in anticipation of a defense argument that Rosemary Calandriello had not been missing so long that the jury could find beyond a reasonable doubt that she was dead. On this record petitioner asked for dismissal of the abduction complaint, not for prosecution of an unsought murder indictment. Finally, given the length of time which may be held to have elapsed in petitioner's case, any prejudice which resulted was an unavoidable byproduct of the criminal prosecution.[13] In our view petitioner was not denied a speedy trial.[14]

13. Petitioner claims to have suffered prejudice because his fiirst attorney died before the instant trial was held and could not testify about the lineup identifications. But petitioner was not entitled to counsel when he was identified by Lydia Hardie and Darlene Hanvey. Alibi witnesses not lost to petitioner testified that he was home on the night Rosemary Calandriello disappeared and that their memories of that evening were clear. Futhermore, while petitioner's automobile was destroyed in April 1973 photographs taken of it in August 1969 were received in evidence at his trial. Thus, that automobile had been avaialble to him when he was arrested on August 27, 1969 and remained so until its destruction in April 1973. Finally, petitioner does not allege how he has been damaged by the unavailability of this vehicle.

14. Petitioner's reliance on *Moore v. DeYoung,* 391 F. Supp. 111 (D.N.J. 1974) *rev'd o.g.* 515 F.2d 437 (3 Cir. 1975), is unavailing. Moore was indicated for atrocious assault and battery and threatening to kill after a previous indictment for carnal abuse based on the same incident, had been dismissed because of the State's failure to have provided a speedy trial. In addition, Moore had undeniably requested that he be tried on the first indictment. Finally, no justifiable basis for the State's delay of 4 years, 1 month and 12 days was found.

Moore was later afforded relief by the Appellate Division of the Superior Court of New Jersey. See *State v. Zarinky,* Docket No. A-2648-74, decided July 20, 1976, unpublished.

Petitioner's second contention, that he was denied due process by the admission of allegedly tainted in-court identifications, proceeds from the selection of his photograph by Thomas Gowers, Michael Hazeltine, David Lowe and Darren Lowe, each of whom had been shown pictorial displays in 1969 and in 1975. In 1969 these four witnesses had selected petitioner's photograph from a group of seven. In 1975 their selection was made from 13 pictures. The photograph of petitioner shown in 1969 bore his name, that shown in 1975 did not. No photograph from the 1969 or the 1975 display was admitted in evidence. Indeed the trial court refused to admit any identification photographs because it found that the prosecution had not established an appropriate chain of evidence. The trial court also ruled however that the identification of petitioner by the four named witnesses proceeded from their having seen him on August 25, 1969 at which time they said he had a goatee and mutton chop side whiskers, all of which appear on Exhibit S-37, a photograph of petitioner taken after his arrest on August 27, 1969. Between the time of petitioner's arrest and the following morning the goatee and the mutton chops were shaved off.

In finding that the in-court identifications by these witnesses were admissible, the trial court spoke as follows:

> "first of all, I am satisfied that the credibility of the identification with respect to the picture of the defendant is such by the four witnesses involved that I was impressed by their testimony and I think that they are credible witnesses. I have ruled out the photographs [displayed at the photographic lineups in 1969 and 1975] on the basis of the failure to prove a chain of evidence. I am satisfied personally that the in-court identification which was made by each of the four witnesses was independent of anything to do with the

photograph identification originally. There was ample opportunity to observe. These witnesses appear to be intelligent people. They made an observation. I think there is every good reason to understand why they would make a particular observation in this particular case because of the fact that they saw Rosemary Calandriello in the front seat and were curious, apparently, from the tenor of their testimony as to why she was there and they did have the opportunity. [The four eye witnesses, schoolmates of Rosemary Calandriello, had testified that their attention was drawn to Rosemary because her reputation caused them to be surprised at finding her in an automobile with a man]. There was no rear window in the back of that convertible. They were riding behind it for some three blocks. They were approximately 30 feet behind. There is no reason why they couldn't have made the observation which they said they did [these witnesses had correctly described petitioner as wearing a goatee and mutton chops and having a stocky build] and now be able to identify the defendant.

"I also take note of the fact that defense counsel has made comment heretofore of the fact that these witnesses were very forthright, honest, with respect to saying that, 'No, we didn't look at this many pictures. We only looked at seven. We didn't look at 13.' If they are credible in that respect there is no reason to say that they shouldn't be credible with respect to the identification and I think they are.

"I think that the State has established and, of course, this will be subject to any cross-examination that you make of the witnesses at the time during the trial as to this particular testimony, but for these purposes at the moment, I think that the State has established by

clear and independent and convincing evidence that their in-court identification is independent of the photographs and accordingly, I will permit that testimony."

28 U.S.C. §2254(d) requires acceptance of findings of fact reached by a trial judge and not subject to any of the several disabilities listed therein. The trial court's finding that the in-court identifications of petitioner by Messrs. Gowers, Hazeltine and Lowe proceeded from their observation of him and Miss Calandriello on August 25, 1969, is a factual determination and as such to be accepted by this court. Whether those in-court identifications deprived petitioner of due process is a matter of law and hence the responsibility of this court. *Townsend v. Sain*, 372 U.S. 293 (1963). On this record those identifications are free of taint and hence did not deprive petitioner of due process.

The trial court permitted Lydia Hardie to testify that on August 23, 1969 at approximately 7:00 P.M. in Leonardo, New Jersey, petitioner stopped his automobile between intersections and asked her, then age 12, to go for a ride and also permitted Darlene Hanvey to testify that he had accosted her on August 9, 1969, at approximately 7:00 P.M. outside a bowling alley in Atlantic Highlands[15] and invited her, then age 14, to go for an automobile ride. Miss Hanvey also testified that petitioner said, "I have stuff in the car if you want to come." Petitioner claims here that the testimony of the Misses Hardie and Hanvey denied him due process.

In due course petitioner was prosecuted for attempting to impair the morals of a minor and for attempted kidnapping in the case of Darlene Hanvey and for the attempted kidnapping of Lydia Hardie. At the end of the prosecution's presentation in the case growing out of the Hardie incident, the indictment was dismissed. In the proecution of the Hanvey indictment, the jury's verdict of guilty was reversed by the Appellate Division[16] on the basis of insufficient evidence.

15. Atlantic Highlands, in which Rosemary Calandriello lived, and Leonardo are neighboring communities.

In this court petitioner contends that in view of the outcome of those two prosecutions, permitting Lydia Hardie and Darlene Hanvey to testify to the mentioned incidents denied him due process. Petitioner's argument here is that the testimony of the two girls was irrelevant and highly prejudicial. He rests his contention on interpretation of New Jersey Rule of Evidence 55, a matter better left to the courts of that State, and on Federal Rule of Evidence 404 which has no application in a State prosecution.[17] In any event the outcome of the State's cases against petitioner based on the Hardie and Hanvey incidents, did not preclude the introduction of their testimony in the trial petitioner now challenges.

Petitioner contends further that he was denied due process by the admission of testimony from Herbert Williams, John Gosch and Albert Glover with whom he was confined to the Monmouth County Jail during November and December 1969.

According to Glover,[18] when petitioner returned from a proceeding at which his bail on the abduction complaint

16. *State v. Zarinsky*, Docket No. A 1875-69, decided February 23, 1971, unpublished.

17. *United States ex rel. Mertz v. State of New Jersey*, 423 F.2d 537, 540 (3 Cir. 1970); *United States ex rel. Johnson v. Hatrack*, 417 F. Supp. 316, 324 (D.N.J. 1976).

18. According to his testimony a complaint for an unspecified indictable offense had been filed against Glover at the time of petitioner's trial. Glover did not come forward with the information about which he testified until 1975.

had been raised, he said "they could never get [Rosemary Calandriello's] body and that underwear in the car he could say . . . belonged to his wife [19] . . ." Asked, according to the transcript, if petitioner had said "why they would find the body" (sic) the witness answered: "He [petitioner] said it was weighted down and . . . was in a lot of water." In context it is apparent that the witness was asked not why petitioner maintained "they would find the body" but rather "why they would not find the body."

Gosch [20] testified that while he was in the Monmouth County Jail petitioner discussed the abduction complaint and said "they'll never find that stinking broad," having referred to her as "the Calandriello girl from the Highlands."

According to Williams [21] petitioner returned from the bail hearing and said "they wasn't going to find . . . the body [which] he had threw from a bridge with weights on, bricks on, or something(sic)." This witness also testified that petitioner had told him "that he had, on the right side of the car . . . removed the handle, the handle from the car [22] * * * because he had some girls, he had picked up some girls and they couldn't get out once they were in the car." It should be noted that a handle fitting that mentioned here was found under the front seat of petitioner's car on August 28, 1969.

19. At trial, petitioner's wife testified that bikini pants found in his automobile belonged to her.

20. At the time of petitioner's trial Gosch was serving a sentence for forgery. In exchange for his testimony the prosecution agreed to write a letter favorable to him to the parole board. He had come foward in late 1969 or early 1970.

21. In anticipation of his testimony at petitioner's trial and on the State's request that he be given "special consideration" Williams received a suspended sentence following his convictions in November 1974 for "obtaining money under false pretenses, uttering forged instruments, credit card theft and possession of stolen property." Like Gosch, Williams had come forward in late 1969 or early 1970.

22. Althought referred to as petitioner's this vehicle was actually registered to his father.

Petitioner's objection to the testimony of these three witnesses is that it was inadmissible because no *corpus delecti* had been established. But a *corpus delecti* may be demonstrated by circumstantial evidence. *United States v. DiOrio*, 150 F.2d 938, 941 (3 Cir. 1945), c.d. 326 U.S. 771 (1945). On the proofs presented this contention has no merit.

Arguing that absent his confession [23] the evidence was insufficient to show the commission of a crime, petitioner contends that the trial court should have held a hearing outside the presence of the jury in order "to determine whether the corroborating evidence was sufficient . . . to allow the confessions to be admitted into evidence." At trial petitioner did not ask for such a hearing and in this court points no authority for this contention. Although petitioner relies here on *Bruton v. United States*, 391 U.S. 123 (1968) and *Jackson v. Denno*, 378 U.S. 368 (1964), both are inapposite.

Petitioner's fifth contention is that he was denied due process by "admission of testimony as to the lineup at which Lydia Hardie and Darlene Hanvey identified . . ." him in that he did not have the benefit of counsel at that proceeding. That lineup was held on August 28, 1969 after petitioner had been arrested on a John Doe complaint which as superceded, charged him with abduction of Rosemary Calandriello. Because petitioner was not under indictment when the lineup was held, there was no requirement that he then be represented by counsel. *United States v. Wade*, 388 U.S. 218 (1967).

23. Petitioner refers here to the inculpating comments testified to by Messrs. Glover, Gosch and Williams.

Petitioner's argument that the Appellate Division's reversal of the jury's verdict in *State v. Zarinsky*, Docket No. A 1875-69, decided February 23, 1971, unreported, barred introduction of testimony about that lineup is without merit. The reason is that the reversal was based on a lack of evidence that petitioner had attempted to kidnap Darlene Hanvey, not on any shortcoming in her identification of him.

Petitioner's reliance on *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Kirby v. Illinois*, 406 U.S. 682 (1972), is simply misplaced.

Petitioner's contention that the admission of certain exhibits denied him due process because the State failed to demonstrate the chain of custody does not present a meritorious constitutional issue.[24]

Petitioner contends further that he was denied due process by the admission of evidence which he alleges was irrelevant and inflammatory. That evidence included a white straw pocketbook, which contained hair clips, produced by Rosemary's mother, and two hair clips,[25] of the same sort, blue bikini underpants, two bottles of beer, a bottle of brandy, a live bullet, a blank casing, a ball peen hammer, a chrome plated hatchet and a folded piece of pink paper taken from petitioner's vehicle.

Petitioner's wife said that she used hair clips like those found in her husband's car and that the blue bikini underpants belonged to her. Mrs. Calandriello testified that her daughter had used the same kind of hair clips and had owned a number of pairs of colored bikini underpants like

24. *Mercado v. Massey*, 536 F.2d 107 (5 Cir. 1976); *Commonwealth of Pennsylvania ex rel. Craig v. Moroney*, c48 F.2d 22, 24 (3 Cir. 1965).

25. Although the respondents' brief describes these hair clips as unique, the record gives no basis for the characterization.

those which had been found in the back of petitioner's car. Although petitioner says that his wife "is several inches shorter and 30 pounds lighter than . . . Rosemary," the record gives no indication of any effort by him or the prosecution to determine whether the underpants fit her. In context, the matter of determining the source of those articles was clearly for the jury.

Lydia Hardie and Darlene Hanvey each testified that when petitioner attempted to induce them to enter his automobile he invited them to go drinking and said that he had "some stuff," implying perhaps the beer or brandy. The live bullet, blank casing, ball peen hammer and hatchet were all introduced as items taken from petitioner's automobile as evidence of the means of murder. The folded pink paper had been used to take blood scrapings from the bumper and tail light of petitioner's automobile. While those scrapings were never identified as human or animal, a police officer testified that when he arrived at petitioner's home on August 27, 1969, two days after Rosemary Calandriello's disappearance, he found petitioner standing over the open trunk of his automobile with a scrub brush in his hand and a pail at his feet. Petitioner's brother-in-law testified that he had cut himself while working on a broken tail light on this automobile.

In view of the circumstantial nature of the prosecution's case we do not find that the introduction in evidence of these items amounted to a constitutional intrusion. A chrome plated hatchet is after all not to be found in the trunk of every automobile. And while the evidence did not necessarily establish that the hair clips and the blue bikini underpants had belonged to the victim, the testimony was sufficient to warrant their admission from the standpoint of the Constitution which is the standard by

which a habeas court measures propriety. *Burgett v. Texas*, 389 U.S. 109, 113-114 (1967); *Woods v. Estelle*, 547 F.2d 269 (5 Cir. 1977); *Commonwealth of Pennsylvania ex rel. Craig v. Maroney, supra* at 24, fn. 3. See also *Cupp v. Murphy*, 412 U.S. 291 (1973).

Petitioner also claims that constitutional error is to be found in the trial court's instruction on murder. Specifically, he contends that "no evidence of premeditation deliberation or willfulness was introduced by the State" with the result that the giving of a first degree murder instruction affronted petitioner's due process right. Only gross instructional error rises to the level of constitutional wrong required to support a habeas application.[26] On the circumstantial proofs presented, we see no error in the challenged instruction,[27] much less one of constitutional scope.

Petitioner's ninth contention is that he "was not afforded a full and fair litigation of this allegation that the search warrant under which his home was entered was patently defective." That search was performed on February 21, 1975 in connection with the murders of Joanne DeLardo and Doreen Carlucci. Petitioner has never been charged, indicted or otherwise prosecuted for those deaths and nothing obtained as a result of that search was introduced at his trial for the murder of Rosemary Calandriello. Clearly, there is no merit to that contention on this application.

Petitioner's tenth contention is that he was denied due process by presentation to the Appellate Division of affidavits concerning occurrences involving Linda Balabanow, Joanne DeLardo and Darlene Carlucci. But it was petitioner who submitted those affidavits[28] to the Appellate Division.[29] On its face this contention involves no constitutional principle and thus has no merit.

26. *Cupp v. Naughten*, 414 U.S. 141, 146 (1973); *United States ex rel. Dorey v. State of New Jersey*, 560 F.2d 584 (3 Cir. 1977).

27. As petitioner has noted in his supporting brief the trial court charged the jury that if it found him guility of murder that finding could be in either the first or second degree. The latter requires no evidence that it was done wilfully, deliberately or with premeditation. *N.J.S.* 2A:113-2. *Commonwealth of Pennsylvania ex rel. Craig v. Maroney, supra* at 24, fn. 3.

Petitioner's last contention is that his "conviction . . . was so totally devoid of evidentiary basis as to deprive him of due process of law." The test here is whether the verdict was supported by any evidence.[30] Treatment of petitioner's first ten contentions and the statement of facts in his own brief on direct appeal, demonstrate that that standard was more than met in this case.

We recommend that this application be denied without evidentiary hearing,[31] *Townsend v. Sain, supra*, or certificate of probable cause.

Respectfully submitted,

/s/ John W. Devine
JOHN W. DEVINE
United States Magistrate

May 30, 1978

28. According to the affidavit of Thomas Mion, "an Investigator with the Monmouth County Prosecutor's Office and a member of the Homicide Squad," Neutron Activation Analysis of hair found on the hammer taken from petitioner's automobile matched it to that of Linda Balabanow who like Joanne DeLardo and Doreen Carlucci had been murdered. These three affidavits all contain information which, if true, is most damaging to petitioner.

29. See Exhibit R-4 , petitioner's appendix on direct appeal, pp. 9a - 25a.

30. *Thompson v. Louisville*, 362 U.S. 199 (1960).

31. The following exhibits, all in *State v. Zarinksy*, have been received:

P-1 Brief in support of instant petition
P-2 Petitioner's pro se supplemental brief
R-1 Trial courts' letter opinion dated March 21, 1975 on pretrial motions by petitioner
R-2 Trial transcript in 20 volumes with separate master exhibit list
R-3 Petitioner's Appellate Division brief
R-4 Petitioner's appendix in support of R-3
R-5 State's brief to the Appellate Division
R-6 Appendix in support of R-5
R-7 Unpublished Appellate Division decision A-2648-74
R-8 Respondents' brief in support of motion to dismiss instant petition
R-9 Respondents' brief and appendix in opposition to petition

APPENDIX E

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT OF NEW JERSEY, SEPTEMBER 22, 1978

(Filed September 22, 1978 at 4:10 P.M.)

/s/ Angelo W. Locascio
ANGELO W. LOCASCIO
Clerk

Raymond M. Brown, Esquire
Browyn, Vogelman & Brown, Esquires
26 Journal Square
Jersey City, New Jersey 07306
(Attorneys for Petitioner)

James M Coleman, Jr., Esquire
Prosecutor of Monmouth County
Monmouth County Courthouse
Freehold, New Jersey 07728
(Attorney for Respondent)

RE: ROBERT ZARINSKY v. STATE OF NEW JERSEY and ROBERT S. HATRAK, the Principal Keeper of the State Prison at Rahway, New Jersey; Civil Action No. 77-1337.

OPINION

Gentlemen:

On May 30th, 1978, the Honorable John W. Devine, United States Magistrate, filed his report and recommendation in this case. On July 7th, 1978, the petitioner filed obections to the report and recommendation. The petitioner raises two primary objections to the report and recommendation. First, the petitioner contends that Magistrate Devine incorrectly determined the speedy trial issue.

See Petitioner's Objections to the Report and Recommendation of Judge Devine, at 3-14 (hereinafter cited as Petitioner's Objections). Second the petitioner contends that Magistrate Devine "compounded" a "harmful constitutional error" by "failing to recognize that the doctrine of collateral estoppel directly affected the admissibility of the testimony of Lydia Hardie and Darlene Hanvey". Petitioner's Objections, at 15.

Magistrate Devine discussed the petitioner's speedy trial argument on pages 1-4 of his report and recommendation. Magistrate Devine found that the delay in this case was not long enough to be considered presumptively prejudicial. Report and Recommendation, at 3 (hereinafter cited as R & R). In addition, Magistrate Devine noted that, even if the delay was presumptively prejudicial, the State's reasons for the delay, when coupled with the petitioner's prejudice, was insufficient to establish a violation of petitioner's right to a speedy trial. *See* R & R, at 4.

As we understand it, the petitioner appears to be arguing that Magistrate Devine erred in concluding that the delay was not presumptively prejudicial, Petitioner's Objections, at 3-7, that the State's reasons for the delay were adequate, *id.* at 7-9, and that the prejudice suffered by the petitioner was not substantial. *Id* at 10-14.

The petitioner's primary support for the argument that Magistrate Devine erred in calculating the length of the delay is *State v. Moore*, 147 N.J. Super. 490 (App. Div.), *pet. for certif. denied*, 74 N.J. 272 (1977).[1] *See* Petitioner's Objections, at 4-7. *Moore*, however, is clearly distinguishable. In *Moore*, the defendant was actually under an in-

1. In *Moore*, the Appellate Division reversed the defendant's conviction on speedy trial grounds. Prior to Moore's state trial, this Court granted Moore's petition for a writ of habeas corpus. *Moore v. DeYoung*, 391 F. Supp. 111 (D.N.J. 1974). The Court of Appeals reversed that decision on the ground that Moore had failed to exhaust his state remedies. *Moore v. DeYoung*, 515 F.2d 437 (3d Cir. 1975).

dictment, stemming from the same incident on which his subsequent indictment and conviction were based, for over three years. *See Moore, supra,* 147 N.J. Super. at 492-93. In this case, as Magistrate Devine pointed out, R & R, at 3, the petitioner was not under any indictment stemming from the incident involving Rosemary Calandriello from May 29th, 1970, to February 21st, 1975. In these circumstances, we agree with Magistrate Devine that the above period should not be included in calculating the petitioner's speedy trial. For additional distinctions between *Moore* and this case, *see* R & R, at 4 n.14.

Furthermore, we reject the petitioner's apparent contention that the reason for the state's delay in returning the murder indictment was to gain a tactical advantage at trial. *See* Petitioner's Objections, at 8-9. Rather, as Magistrate Devine indicated, R & R, at 4, the delay was necessary in order to permit the jury to infer that Rosemary Calandriello was in fact dead.

As for the prejudice element, the petitioner appears to point to two factors: First, that the delay somehow resulted in a violation of the petitioner's right to counsel under *Massiah v. United States,* 377 U.S. 201 (1964), *see* Petitioner's Objections, at 11-12; and, second, that the delay resulted in the admission of tainted in-court identifications because of the death of petitioner's first attorney. *See* Petitioner's Objections, at 12-14.

As for the allegation of prejudice based on *Massiah,* we do not see any relationship between a violation of the petitioner's right to counsel, if any such violation occurred,[2] and the petitioner's right to a speedy trial. If the petitioner had gone to trial on the day following the alleged *Massiah* violation, there clearly would not have been any speedy trial violation, yet the *Massiah* violation would have been the same. Petitioner has not pointed out how the delay in his trial in any way exacerbated the alleged *Massiah* violation. In fact, it seems that the petitioner has attempted to link the alleged *Massiah* violation with the speedy trial claim in an effort to avoid the fact that no *Massiah* violation was ever raised in the state courts.

2. We should point out that we do not feel that any violation of *Massiah* occurred in this case. While it is true that the petitioner was under indictment when he made incriminating statements to John Gocch, petitioner was not under indictment for any actions ivolving Rosemary Caladriello. *See* Petitioner's Objections, at 11-12.

We have similar difficulty with the prejudice alleged to flow from the death of petitioner's first attorney. Throughout this proceeding, and in the state courts, petitioner claimed that the death of his first attorney resulted in prejudice because his first attorney possessed unique knowledge of the circumstances surrounding a line-up, conducted on August 28th, 1969, at which petitioner was identified by Lydia Hardie and Darlene Hanvey. *See* Exhibit P-1, Brief in Support of Petition of Writ of Habeas Corpus, at 13-14; Exhibit R-3, Brief for Defendant-Appellant, at 27 (hereinafter cited as Petitioner's Appellate Court Brief); Exhibit R-7, *State v. Zarinsky,* A-2648-74, Unpublished Opinion, at 19-20, 25-26 (Sup. Ct., App. Div., filed July 20, 1976). Both Magistrate Devine and the state courts found that the loss of this information did not constitute prejudice because petitioner had no right to counsel at the time the line-up was conducted. *See* R & R, at 5 n.13; *Zarinsky, supra,* at 19-20, 25-26.

In his objections to the Report and Recommendation, petitioner does not challenge this conclusion. Rather, petitioner now argues that the death of his first attorney resulted in prejudice from another source. Specifically, petitioner alleges, by way of an affidavit, that during a preliminary hearing held on August 28th, 1969, he was exhibited to Michael Hazeltine, Thomas Gowers, David

Low, and Darren Low in an unconstitutionally suggestive manner. *See* Affidavit of Robert Zarinsky, filed July 7th, 1978, at ¶¶2-11. Petitioners counsel, relying on this affidavit, concludes that this alleged constitutional violation went undiscovered because: "The person with the most intimate legal knowledge of the preliminary proceeding was [petitioner's first attorney], but he died in July, 1972." Petitioner's Objections, at 14.

We should emphasize that the petitioner is attempting to establish prejudice, an element of a speedy trial claim, through the death of his first attorney. Petitioner *is not* arguing that he is entitled to the issuance of a writ because the in-court identifications of Hazeltine, Gowers, Low, and Low were rendered unconstitutional by their alleged presence at the preliminary hearing. Such a claim was not made in the state courts and is not properly before this Court.[3] Thus, petitioner appears to be arguing that the death of his first attorney somehow resulted in the failure to raise this issue in the state court. Based on petitioners affidavit, however, we simply can not reach that conclusion. In fact, petitioner's affidavit suggests that his first attorney was totally unaware of the alleged presence of the four witnesses in the court room during the preliminary hearing. *See* Affidavit of Robert Zarinsky, *supra,* at ¶4. For us to conclude that this issue would have been raised if the petitioner's first attorney had been alive at the time of trial would be pure speculation. Accordingly, we can not find that the death of petitioner's first attorney resulted in any significant prejudice.

The petitioner's second objection to the report and recommendation concerns the testimony of Lydia Hardie and Darlene Hanvey. *See* Petitioner's Objections, at

3. Petitioner argued in the state courts that the in-court identifications were unconstitutional because they were not free from the taint of an illegal photographic display. *See* R & R, at 4-6; ePtitioner's Appellate Brief, at 40-49; *Zarinksy, supra,* at 26-27.

15-18. Petitioner argues that the state court, by admitting the testimony of these two witnesses, violated petitioner's rights under the double jeopardy clause of the United States Constitution. *See id.* at 18. Throughout the state court proceedings, the petitioner argued that the testimony of these two witnesses was barred under New Jersey's law of evidence. *See, e.g.,* Petitioner's Appellate Court Brief, at 49-58; *Zarinsky, supra,* at 23-24; R & R, at 6-7. Petitioner's appellate division brief mentions the double jeopardy clause only once and in the context of his state law arguments. *See* Petitioner's Appellate Brief, at 56. In his objections to the report and recommendapetitioner relies on the case of *Ashe v. Swenson,* 397 U.S. 436 (1971), and *Wingate v. Wainright;* 464 F.2d 209 (5th Cir. 1972). *Ashe* is not cited in Petitioner's appellate division brief. *See* Petitioner's Appellate Brief, at iii, 49-58. *Wingate* is cited once, Petitioner's Appellate Brief, at 57, but not in support of the proposition being asserted in petitioner's objections to the report and recommendation.

In these circumstances, we can not say that the petitioner's double jeopardy claim has been fairly presented to the state courts. *Picard v. Connor,* 404 U.S. 270, 275 (1971); *United States ex rel. Trantino v. Hatrack,* 563 F.2d 86, 93-98 (3d Cir. 1977); *Zicarelli v. Gray,* 543 F.2d 466, 470-75 (3d Cir. 1976 (en banc). Furthermore, petitioner may be able to obtain state court review on an application for post-conviction relief pursuant to N.J.R. 3:22. *See United States ex rel. Winrow v. Hatrak,* Civ. No. 75-0749, slip op., at 4-8 (D.N.J. filed Mar. 31, 1978). Therefore, we decline to address the merits of petitioner's second objection to the report and recommendation.

Accordingly, in light of the foregoing, we find the petitioner's objections to Magistrate Devine's report and rec-

ommendation to be without merit. The Court will enter an order dismissing the petition based on the report and recommendation, as supplemented by this opinion.

Very truly yours,

/s/ George H. Barlow
GEORGE H. BARLOW
Chief Judge
United States District Court

GHB/ebj

ORDER

BARLOW, Chief Judge

Petitioner, Robert Zarinsky, seeks issuance of a writ of habeas corpus pursuant to the provisions of 28 U.S.C. §2241, *et seq.*, attacking the legality of his confinement in the New Jersey State Prison.

Upon the filing of respondents' answer, the cause was referred to the Honorable John W. Devine, United States Magistrate, pursuant to General Rule 40 E(3), for his preliminary review and report and recommendation to this Court as to whether a hearing is warranted.

This Court has conducted an independent review, in compliance with *Townsend v. Sain*, 372 U.S. 293 (1963), and 28 U.S.C. §636(b)(1)(B), of the petition for the writ, the pleadings, the briefs and appendices, the trial transcript, and the report and recommendation and supplemental report and recommendation of the Federal Magistrate, both filed on May 30th, 1978. The Court has, further, reviewed the petitioner's objections to the Magistrate's reports and recommendations and finds them to be without merit for the reasons expressed in the opinion of this Court filed on September 22nd, 1978; and upon consideration of the foregoing,

IT IS, on this Twenty-second day of September, 1978,

ORDERED that the report and recommendation and the supplemental report and recommendation of the Federal Magistrate be, and hereby is, adopted as the opinion of this Court, and that the petition for writ of habeas corpus of Robert Zarinsky filed in this Court on July 6th, 1977, is hereby dismissed without an evidentiary hearing, and this Court certifies there is no probable cause for appeal from this order. No costs.

/s/ George H. Barlow
Chief Judge
United States District Court

APPENDIX F

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DECEMBER 11, 1978

Present: ALDISERT, ADAMS and HUNTER, *Circuit Judges.*

Submitted is appellant's motion for certificate of probable cause.

Submitted: December 11, 1978 or as the court decides.

Sincerely,

/s/
Senior Staff Attorney

LDJ/MDB/cb

The foregoing Motion is denied.

By the Court:

/s/ Aldisert
Judge

Dated: December 11, 1978

APPENDIX G

AFFIDAVITS

AFFIDAVIT OF SEYMOUR MARGULIES

STATE OF NEW JERSEY)
COUNTY OF HUDSON) ss.:

SEYMOUR MARGULIES, being duly sworn according to law, upon his oath, deposes and says:

1. On March 16, 1976 I was in attendance before the Superior Court of New Jersey, Appellate Division, at the court room in Newark in anticipation of the presentation of an oral argument to the court.

2. While in the court room I had the opportunity of observing other matters being presented to the court, one of which was the case of State v. Zarinsky.

3. There was a young man arguing for the State and Mr. Richard F. Plechner presented the matter for the defendant.

4. After the presentation of that oral argument I had the occasion to meet Mr. Plechner in the corridor and expressed my surprise at one of the arguments that had been presented by the State because in colloquy with the court the attorney had informed the court that the matter had not been tried as early as the circumstances might have permitted because of something akin to the tenor or climate or spirit of the time; that there was a certain spirit of "flower power" present. My best recollection is that that term was used or one like it was used to express the social Zeitgeist which had dampened the state's ardor to move the case.

5. The comment to Mr. Plechner was presented officiously on my part but it is that comment which stirs to refresh my recollection of that oral argument.

6. I was requested several months thereafter to confirm to Mr. Plechner my impressions. I have this date been requested by his office to put them in affidavit form and is the reason for the within affidavit.

/s/ Seymour Margulies
SEYMOUR MARGULIES

NOTARIZED

AFFIDAVIT OF ALAN A. DAVIDSON

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss.:

The undersigned, being duly sworn according to law, upon his oath, deposes and says:

1. I was present at the oral argument before the Appellate Division in the above matter on March 16, 1976.

2. John Mullaney, Assistant Monmouth County Prosecutor, said on behalf of the State that the indictment in the within cause was not brought until February 1976 as his office wanted the delay in order to find a jury that would convict appellant. More specifically, he said that in 1969-1970 a jury could not be found, in his opinion, who would convict appellant due to the climate or tenor of the times and the existence of "flower power, hippies and runaways."

3. Mr. Mullaney intimated that the exitence of "flower power, hippies and runaways" increased the likelihood that a jury would believe that Rosemary Calandriello would have run away from home and not have been murdered as contended in the charge against appellant.

4. Of the 3 member Appellate Division panel, Judge Kolovsky appeared the most concerned with such an excuse for delay on behalf of the State. Persons sitting within the room could not help but notice the change in the climate of the arguments of the prosecutor, upon realizing his apparent faux-pas. I, for one, was relieved that he was so candid in his presentation and left the oral argument with the feeling that this point alone had made a large impact upon the Appellate Division. The case law supports the idea that intended delay is to be frowned upon. When coupled with the length of the delay herein, the defendant's

assertion of his right and the prejudice which flowed therefrom, any holding that Robert Zarinsky was not denied a right to speedy trial would be fundamentally unfair and in contravention of his rights as an accussed.

/s/ Alan A. Davidson
ALAN A. DAVIDSON

NOTARIZED

AFFIDAVIT OF RICHARD F. PLECHNER

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss.:

The undersigned, being duly sworn according to law, upon his oath, deposes and says:

1. I was present at the oral argument before the Appellate Division, in the above matter, on March 16, 1976.

2. John Mullaney, Assistant Monmouth County Prosecutor, said on behalf of the State that the indictment in the within cause was not brought until February 1976 as his office wanted the delay in order to find a jury that would convict appellant. More specifically, he said that in 1969-1970 a jury could not be found, in his opinion, who would convict appellant due to the climate or tenor of the times and the existence of "flower power, hippies and runaways."

3. Mr. Mullaney intimated that the existence of "flower power, hippies and runaways" increased the likelihood that a jury would believe that Rosemary Calandriello would have run away from home and not have been murdered as contended in the charge against appellant.

/s/ Richard F. Plechner
RICHARD F. PLECHNER

NOTARIZED

AFFIDAVIT OF LYNN ZARINSKY

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss.:

The undersigned, being duly sworn according to law, upon her oath, deposes and says:

1. I was present at the oral argument before the Appellate Division in the above matter on March 16, 1976.

2. John Mullaney, Assistant Monmouth County Prosecutor, said on behalf of the State that the indictment in the within cause was not brought until February 1976 as his office wanted the delay in order to find a jury that would convict Appellant. More specifically, he said that in 1969-1970 a jury could not be found, in his opinion, who would convict Appellant due to the climate or tenor of the times and the existence of "flower power, hippies and runaways."

3. Mr. Mullaney intimated that the existence of "flower power, hippies and runaways" increased the likelihood that a jury would believe that Rosemary Calandriello, would have run away from home and not have been murdered as contended in the charge against Appellant.

/s/ Lynn Zarinsky
LYNN ZARINSKY

NOTARIZED

AFFIDAVIT OF VERONICA ZARINSKY

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss.:

The undersigned, being duly sworn according to law, upon her oath, deposes and says:

1. I was present at the oral argument before the Appellate Division in the above matter on March 16, 1976.

2. John Mullaney, Assistant Monmouth County Prosecutor, said on behalf of the State that the indictment in the within cause was not brought until February 1976 as his office wanted the delay in order to find a jury that would convict Appellant. More specifically, he said that in 1969-1970 a jury could not be found, in his opinion, who would convict Appellant due to the climate or tenor of the times and the existence of "flower power, hippies and runaways."

3. Mr. Mullaney intimated that the existence of "flower power, hippies and runaways" increased the likelihood that a jury would believe that Rosemary Calandriello, would have run away from home and not have been murdered as contended in the charge against Appellant.

/s/ Veronica Zarinsky
VERONICA ZARINSKY

NOTARIZED

AFFIDAVIT OF PETER SAPSA

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss.:

The undersigned, being duly sworn according to law, upon his oath, deposes and says:

1. I was present at the oral argument before the Appellate Division in the above matter on March 16, 1976.

2. John Mullaney, Assistant Monmouth County Prosecutor, said on behalf of the State that the indictment in the within cause was not brought until February 1976 as his office wanted the delay in order to find a jury that would convict Appellant. More specifically, he said that in 1969-1970 a jury could not be found, in his opinion, who would convict Appellant due to the climate or tenor of the times and the existence of "flower power, hippies and runaways."

3. Mr. Mullaney intimated that the existence of "flower power, hippies and runaways" increased the likelihood that a jury would believe that, Rosemary Calandriello, would have run away from home and not have been murdered as contended in the charge against Appellant.

/s/ Peter Sapsa
PETER SAPSA

NOTARIZED

AFFIDAVIT OF MILDRED PARTESI

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss.:

The undersigned, being duly sworn according to law, upon her oath, deposes and says:

1. I was present at the oral argument before the Appellate Division, in the above matter, on March 16, 1976.

2. John Mullaney, Assistant Monmouth County Prosecutor, said on behalf of the state that the indictment in the within cause was not brought until February 1976 as his office wanted the delay in order to find a jury that would convict appellant. More specifically, he said that in 1969-1970 a jury could not be found, in his opinion, who would convict appellant due to the climate or tenor of the times and the existence of "flower power, hippies and runaways."

3. Mr. Mullaney intimated that the existence of "flower power, hippies and runaways" increased the likelihood that a jury would believe that Rosemary Calandriello would have run away from home and not have been murdered as contended in the charge against appellant.

/s/ Mildred Partesi
MILDRED PARTESI

NOTARIZED

AFFIDAVIT OF PATRICIA A. PLECHNER

STATE OF NEW JERSEY)
COUNTY OF MIDDLESEX) ss.:

The undersigned, being duly sworn according to law, upon her oath, deposes and says:

1. I was present at the oral argument before the Appellate Division, in the above matter, on March 16, 1976.

2. John Mullaney, Assistant Monmouth County Prosecutor, said on behalf of the State that the indictment in the within cause not brought until February 1976 as his office wanted the delay in order to find a jury that would convict appellant. More specifically, he said that in 1969-1970 a jury could not be found, in his opinion, who would convict appellant due to the climate or tenor of the times and the existence of "flower power, hippies and runaways."

3. Mr. Mullaney intimated that the existence of "flower power, hippies and runaways" increased the likelihood that a jury would believe that Rosemary Calandriello would have run away from home and not have been murdered as contended in the charge against appellant.

/s/ Patricia A. Plechner
PATRICIA A. PLECHNER

NOTARIZED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1395

ROBERT ZARINSKY,

Petitioner,

vs.

STATE OF NEW JERSEY and
ROBERT S. HATRAK, Principal Keeper,
Rahway State Prison,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALEXANDER D. LEHRER,
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Attorney for [redacted]
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JOHN T. MULLANEY, JR.,
Assistant Prosecutor
Of Counsel and
On the Brief

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

ROBERT ZARINSKY,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, Robert Zarinsky, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit denying his motion for the issuance of a certificate of probable cause. Said motion was brought as a result of the refusal of Hon. George Barlow, U.S.D.J., to issue such a certificate in his order adopting the report and recommendation of Hon. John W. Devine, U.S. magistrate, which denied the petitioners application for a writ of Habeas Corpus.

REASONS FOR DENYING WRIT OF CERTIORARI

Respondent relies on all orders and opinions filed previously in this matter and as reflected in petitioners appendix, however, the Respondent supplements said appendix with the opinion of the New Jersey Supreme Court in this matter, which opinion was omitted by petitioner.

APPENDIX A

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. ROBERT ZARINSKY, DEFENDANT-APPELLANT. Argued September 19, 1977—Decided November 17, 1977.

SYNOPSIS

Defendant was convicted in Monmouth County Court of first degree murder, and the Superior Court, Appellate Division, 143 N.J. Super. 35, affirmed. The Supreme Court, Pashman, J., held that despite a decision by the New Jersey Supreme Court effectively ruling the death penalty unconstitutional, there is no statute of limitations for murder in New Jersey.

Affirmed.

Criminal law key 147

Despite ruling by New Jersey Supreme Court which effectively held death penalty to be unconstitutional, five-year statute of limitations excepting only crimes punishable with death did not apply in first-degree murder prosecution; there is no statute of limitations for murder in New Jersey. *N.J.S.A.* 2A:86-3, 2A:113-3, 4, 2A:159-2; *R.* 3:25-3; *U.S.C.A. Const.* Amends. 5, 6; *Const.* 1947, Art. I, par. 11; 18 *U.S.C.A.* §§1201, 3281.

Mr. Richard F. Plechner argued the cause for appellant (*Mr. Plechner*, attorney; *Mr. Alan A. Davidson*, on the brief).

Mr. John T. Mullaney, Jr., Assistant County Prosecutor, argued the cause for respondent (*Mr. James M. Coleman, Jr.*, Monmouth County Prosecutor, attorney).

Ms. Janice Mironov, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. David S. Baime and Mr. John DeCicco*, Deputies Attorney General, of counsel.)

The opinion of the court was delivered by

PASHMAN, J. Defendant Robert Zarinsky was convicted by a jury of the first degree murder of Rosemary Calandriello. He received the mandatory sentence of life imprisonment. *N.J.S.A.* 2A:113-4; *State v. Funicello*, 60 N.J. 60 (1972), *cert. den. sub nom. New Jersey v. Presha*, 408 U.S. 942, 92 S. Ct. 2849, 33 L.Ed.2d 766 (1972). Defendant's motion for a new trial was denied. The Appellate Division affirmed his conviction, rejecting the numerous grounds of appeal advanced by defendant. *State v. Zarinsky*, 143 N.J. Super. 35 (App. Div. 1976). Our grant of certification was limited to the issue of whether the defendant's prosecution was barred by the statute of limitations. 72 N.J. 459 (1976).

Due to the limited scope of this appeal, it is unnecessary that we recapitulate all of the details of the crime and investigation which are set forth in the opinion below. See 143 N.J. Super. at 41-48. The following facts are relevant to our present inquiry. At approximately 6:00 P.M. on August 25, 1969, seventeen year old Rosemary Calandriello left her home on Center Avenue in Atlantic Highlands, New Jersey, to buy milk and ice pops at two neigh-

borhood stores. She took $2.00 with her and indicated that she would be right back. A neighbor saw her walking down Center Avenue toward the center of town. Another neighbor, Mrs. Vaughn, saw a stocky man slouched in an old, black and white Ford automobile near a bowling alley on Center Avenue. Shortly thereafter, four boys who were schoolmates of Rosemary saw her riding with a stocky man in a Ford Galaxie with a black convertible top. That man was later identified as defendant. Rosemary Calandriello has not been seen or heard from since, and her body has never been recovered. She was promptly reported as missing to the police who immediately started an investigation.

On August 26 the four boys who had seen Rosemary with defendant furnished the police with a description of him and of the vehicle he was driving. The police later learned that two days after Rosemary's disappearance, a man fitting defendant's description had attempted to lure two twelve year old girls into his car in the nearby town of Leonardo. One of the girls had noted the license plate number, CTI 109, of the car from which the offer of a ride had come. Further investigation also revealed that a man fitting defendant's description had attempted to lure two fourteen year old girls into his car two weeks earlier at the same bowling alley on Center Avenue.

A check of the license plate number indicated that the car was registered to defendant's father, with whom defendant and his wife lived in Linden, New Jersey. On August 27, 1969, a "John Doe" complaint was signed charging defendant with contributing to the delinquency of Rosemary Calandriello, a minor. In the late evening of August 27, defendant was arrested at his residence in Linden and the automobile was impounded. The next morning the car was identified by the four boys. Later that day a lineup was held in which the four girls viewed and identified defendant.

The initial complaint against Zarinsky was amended on August 28 to charge him with abduction of Rosemary for an immoral purpose. *N.J.S.A.* 2A:86-3.[1] In June 1970, the complaint charging abduction of Rosemary was dismissed by the trial court on defendant's motion pursuant to *R.* 3:25-3 for unnecessary delay in presenting the charge to a grand jury. Although no criminal charges were pending after June 1970, the investigation of the defendant continued. On February 20, 1975 Zarinsky was indicted for the murder of Rosemary Calandriello. His conviction was based largely on circumstantial evidence. The only issue we address is whether the indictment, returned some five and a half years after the criminal event, was barred by the statute of limitations.

Prior to *State v. Funicello*, 60 N.J. 60 (1972), *cert. den. sub nom. New Jersey v. Presha*, 408 U.S. 942, 92 S. Ct. 2849, 33 L.Ed.2d 766 (1972), the death penalty was mandatory for one convicted by a jury of first degree murder, unless the jury recommended life imprisonment. Our murder statute provides:

> Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed. [*N.J.S.A.* 2A:113-4, *L.* 1898, *c.* 235 §108, am. by *L.* 1916, *c.* 270, §1, *L.* 1919, *c.* 134 §1.]

As a result of *Funicello, supra*, the present rule in New Jersey is that conviction of murder in the first degree

1. The defendant was later indicted with respect to the incidents involving the other four girls. The case against defendant involving the two twelve year olds was dismissed by the trial judge at the close of the State's proofs. He was convicted of crimes involving the fourteen year olds, but the Appellate Division reversed these convictions on the ground that the proofs did not support the charges.

carries the penalty of mandatory life imprisonment. Before that decision, *N.J.S.A.* 2A:113-3 had prohibited a death sentence where a defendant pleaded *non vult* to a murder indictment. However, where a defendant insisted on a trial by jury and was convicted, *N.J.S.A.* 2A:113-4 required the death sentence unless the jury recommended life imprisonment. *Funicello* held that the New Jersey scheme ran afoul of the principles set forth in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968), where the death penalty provision in the federal kidnapping statute was declared invalid. It too had provided for a death sentence only upon a conviction by a jury, but differed from the New Jersey scheme in that a death sentence was only imposed upon the recommendation of the jury. Neverthless, the death penalty provision of the kidnapping statute was struck down as an unconstitutional burden on the assertion of the accused's Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial. But *cf. State v. Corbitt*, 74 N.J. 379 (1977). Thus, although the death penalty has not been ruled unconstitutional *per se*, it has effectively ceased to exist in New Jersey. To date, no statute implementing capital punishment in this State has been enacted.

The relevant statute of limitations, *N.J.S.A.* 2A:159-2, L. 1898, c. 237 §152, am. by L. 1953, c. 204 §1, reads as follows:

> Except as otherwise expressly provided by law no person shall be prosecuted, tried or punished for any offense not punishable with death, unless the indictment therefor shall be found within five years from the time of committing the offense or incurring the fine or forfeiture. This section shall not apply to any person fleeing from justice.

Since the only crimes not covered by the statute are characterized as those punishable with death, defendant argues that the non-enforceability of the death penalty in New Jersey renders all crimes subject to the limitations period. It is undisputed that defendant's indictment for murder was not within five years from the time he allegedly committed the offense.

In *State v. Johnson*, 61 N.J. 351 (1972), a case heavily relied on by defendant, we held that since murder is no longer a capital offense, our State Constitution requires that an individual charged with murder be eligible for bail. *N.J. Const.* (1947), Art. I, par. 11 provides that all persons are entitled to bail before conviction "except for capital offenses when the proof is evident or presumption great." The term "capital offenses" has generally been defined to refer to those crimes for which the death penalty may be imposed. *State v. Johnson, supra*, 61 N.J. at 355; *State v. Konigsberg*, 33 N.J. 367, 371 (1960); *State v. Williams*, 30 N.J. 105, 125 (1959). Defendant submits that *State v. Johnson, supra*, is analogous to the instant case. He contends that just as the lack of a death penalty mandated bail eligibility for persons accused of murder, so it requires application of the statute of limitations to indictments for that offense. We disagree.

The constitutional provision precluding bail in certain capital cases is not apposite to the rationale for excepting crimes punishable by death from the statute of limitations. As we said in *State v. Johnson, supra*:

> The underlying motive for denying bail in capital cases was to secure the accused's presence at the trial. In a choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the many State Constitutions felt that an accused would probably prefer the latter. But when life was

> not at stake and consequently the strong flight-urge was not present, the framers obviously regarded the right to bail as imperatively present. *State v. Konigsberg, supra; State v. Williams, supra.* It was considered that pretrial release on non-capital charges was a fundamental right founded in freedom and human dignity, reflected in the everpresent presumption of innocence, and requiring firm articulation in the Constitutions. As the United States Supreme Court said in *Stack v. Boyle*, 342 *U.S.* 1, 4, 72 *S. Ct.* 1, 3, 96 *L.Ed.* 3, 6 (1951), "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. • • • Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." [61 *N.J.* at 360; footnote omitted.]

This Court has never recognized any fundamental right to avoid criminal prosecution due solely to passage of time. No provision in the United States Constitution or in the Constitution of this State is even remotely suggestive of such a right.

A criminal statute of limitations is designed to protect individuals from charges when the basic facts have become obscured by time. *Toussie v. United States*, 397 U.S. 112, 114-115, 90 S. Ct. 858, 25 L.Ed.2d 156, 161 (1970); *Sutherland*, 3 *Statutory Construction* §70.03, p. 301, n.2 (4th ed. 1974). Balanced against this consideration is the right of the public to have criminals brought to justice. Our Legislature has determined that the societal interest in punishing the guilty is so strong with respect to certain crimes that the countervailing concern of protecting persons from prosecution for crimes in the distant past is wholly overcome. As to all other offenses, there is an absolute bar to prosecution after a specified period. *See In re Pillo*, 11 N.J. 8, 17-18 (1952); *Moore v. State*, 43 N.J.L. 203, 209 (E. & A. 1811).

Despite the strong interest in preventing persons from being prosecuted at a time far removed from the alleged crime, at great prejudice to their ability to mount an effective defense, the crime of murder has never been subject to a limitations period in New Jersey. The first statute of limitations enacted in this State, Pat. L. 1796, p. 208 §73, specifically excepted the crime of murder from its coverage.[2] So too did the 1879 amendments to that act. L. 1879, c. 101 §1 at 183.[3] In 1898 a statute was passed abolishing the statute of limitations for all capital crimes except treason. L. 1898, c. 237 §152.[4] The present statute was enacted in

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2. *Paterson's Laws*, p. 208, §73 (1796):

> And be it enacted by the authority aforesaid, That no person or persons shall be prosecuted, tried or punished for treason, or other offence punishable with death (murder excepted) unless the indictment for the same shall be found by a grand jury, within three years next after the treason or other offence, punishable with death, shall be done or committed; nor shall any person be prosecuted, tried or punished for any offence not punishable with death, unless the indictment for the same shall be found within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: Provided, That nothing herein contained shall extend to any person or persons fleeing from justice.

3. L. 1879, c. 101, §1:

> And be it enacted, that no person or persons shall be prosecuted, tried or punished for treason or other offence punishable with death (murder excepted) unless the indictment for the same shall be found by a grand jury, within three years next after the treason or offence punishable with death, shall be done or committed; nor shall any person be prosecuted tried or punished for any offence not punishable with death, unless the indictment shall be found within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid; provided, that any person holding, or having held, or who may hereafter hold any public office or employment, or exercise the functions of such office or employment, either under this state, or any county, city, borough, town or township therein, whether elective or appointive, may be prosecuted, tried and punished for any fraud, malfeasance or other misconduct committed whilst in such office or employment, where the indictment has been or may be found within five years from the time of committing the offence aforesaid; and provided further, that nothing herein contained shall extend to any persons fleeing from justice.

4. L. 1898, c. 237, §152:

> No person or persons shall be prosecuted, tried or punished for treason unless the indictment for the same shall be found within three years next after the treason shall be done or committed; nor shall any person be prosecuted, tried or punished for any offense not punishable with

1953. It continued the capital/non-capital distinction, as it excepted all crimes punishable by death from its limitations period. *N.J.S.A.* 2A:159-2.

Only two other jurisdictions which make a capital/non-capital distinction in their statutes of limitations have considered the effect of the invalidity of the death penalty on the limitation of prosecutions. In *U.S. v. Provenzano*, 423 F. Supp. 662 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 562 (2 Cir. 1977), a federal court faced the issue in the context of a kidnapping charge. Prior to 1972 kidnapping was punishable by death. 18 U.S.C. §1201. Under 18 U.S.C. §3281, "[a]n indictment for any offense punishable by death may be found at any time without limitation." In *United States v. Jackson*, *supra*, the Supreme Court held the death penalty provision of the kidnapping act unenforceable. Congress responded to that decision in 1972 by repealing the death penalty provision of 18 U.S.C. §1201 and setting the maximum punishment for violation of the statute at life imprisonment.

After examining the legislative history, the Court concluded that

> [w]e agree with the government that the term 'capital offense' was used in §3281 as a shorthand reference to a category of offenses of a particularly serious nature. The ruling in *Jackson* did not alter the nature of the offense. The *Jackson* court concluded that Congress would not want the whole statute to fall just because the death penalty provision could not constitutionally stand (390 *U.S.* at 590-91, 88 *S. Ct.* 1209). Thus the Court held that the penalty provision was severable. We might be inclined, therefore, were *Jackson* the only pertinent event, to hold that it did not transform §1201 into a non-capital offense for purposes of the applicability of §3281, and to rule that the prosecution here would be timely. [*United States v. Provenzano*, *supra* at 666.]

death, unless the indictment shall be found within two years from the time of committing the offense or incurring the fine or forfeiture; provided, any person holding or having held, or who may hereafter hold any public office or employment, either under this state, or any county, city, borough, town or township therein, whether elective or appointive, may be prosecuted, tried and punished for any forgery or embezzlement committed whilst in such office or employment, where the indictment has been or may be found within five years from the time of committing the offense aforesaid; and provided further, nothing herein contained shall extend to any person fleeing from justice.

The Court went on to hold that since the 1972 Congressional amendment had altered the nature of the offense by making it a non-capital crime, the statute of limitations applied to bar the prosecution of the defendants. We note that the New Jersey Legislature has not seen fit to enact any comparable legislation reducing murder to a non-capital offense.

The Supreme Court of Florida has held that there is no statute of limitations for crimes punishable with death which were committed prior to the decision of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346, *reh. den.* 409 U.S. 902, 93 S. Ct. 89, 34 L.Ed.2d 163 (1972), on the ground that the statute of limitations in effect at the time of the crime controls. *State ex rel. Manucy v. Wadsworth*, 293 S.E.2d 345, 347 (Fla. 1974). The effect of *Furman* was to invalidate Florida's death penalty law. However, under the law in effect at the time of the murder in the *Manucy* case, Fla. Stat. §932.05 Limitations of Prosecutions (1969), capital crimes could be prosecuted at any time subsequent to the alleged offense.

Defendant's crime was committed before our decision in *Funicello*, *supra*. In line with the rationale of *State ex rel. Manucy v. Wadsworth*, *supra*, we could hold that since New Jersey had a death penalty at the time of his crime, Zarinsky is subject to the statute of limitations rule as it then existed; the effect of *Funicello* on that rule would thus be irrelevant to his case. However, we decline to so limit our holding. We find persuasive the reasoning of *United States*

v. Provenzano, supra at 666, *ante* at 108 that the term capital offense in the federal statute of limitations was used as a "shorthand reference" to a category of particularly serious offenses. Accordingly, we find no merit in defendant's claim that the reference in *N.J.S.A.* 2A:159-2 to offenses punishable by death points toward the death penalty itself rather than to the particularly heinous class of crimes which were formerly subject to capital punishment.

We decline to hold that *State v. Johnson, supra*, necessarily precludes the viability of the class of crimes once punishable by death. Rather, we choose to examine individually each legislative enactment affected by the concept of crimes punishable with death in an effort to discern the intent of the lawmakers. Where a particular provision is inextricably tied to the imposition of the death penalty itself, as was the act refusing bail to persons accused of capital crimes, it will no longer be operative. Conversely, where our view of the legislative design implicates a broader policy goal, the statute will be construed in light of such purpose. The exclusion of crimes punishable with death from the statute of limitations has a strong logical basis when viewed as a policy decision that certain crimes are so heinous as to be always amenable to prosecution. We prefer to construe the statute of limitations in harmony with this obvious intent.

Defendant argues that it is improper to use an unconstitutional statute for any purpose, including a search for legislative intent. The cases indicate otherwise. In *Rutgers Chapter &C v. New Brunswick*, 129 N.J.L. 238 (Sup. Ct. 1942), *aff'd*, 130 N.J.L. 216 (E. & A. 1943), the court noted that "[a] provision that is unconstitutional, and therefore ineffective as law, is yet to be regarded on the question of the intention of the lawmaker." 129 N.J.L. at 242-43, citing *Attorney-General v. Anglesa*, 58 N.J.L. 372 (Sup. Ct. 1885).

The court went on to refer to the following language from *Davis v. Wallace*, 257 U.S. 478, 484-85, 42 S. Ct. 164, 166, 66 L.Ed. 325, 329 (1921), with which we are in complete accord:

> The reasoning on which the decisions proceed is illustrated in *State ex rel. McNeal v. Dombaugh*, 20 *Ohio St.* 167, 174. In dealing with a contention that a statute containing an unconstitutional proviso should be construed as if the remainder stood alone, the court there said: 'This would be to mutilate the section, and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of the law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is stricken out. For all the purposes of construction it is to be regarded as part of the act. The meaning of the legislature must be gathered from all they have said, as well from that which is ineffective for want of power as from that which is authorized by law.' [*See* 129 *N.J.L.* at 243]

Similarly, in *Washington National Insurance Co. v. Board of Review*, 1 N.J. 545, 556-57 (1949), we held that "[i]n the quest for the intention, we cannot ignore the clause which renders the classification invalid." Thus, we reject the contention that the invalidity of the death penalty provision in *N.J.S.A.* 2A:113-4 prevents its consideration by the Court in interpreting the statute of limitations and in ascertaining the essential purpose of the Legislature in exempting certain types of crimes from the limitation provisions of the statute.

In *State v. Brown*, 22 N.J. 405 (1956), this Court held that a conviction of second degree murder, a crime not punishable by death, did not trigger the statute of limita-

tions so as to retroactively bar the indictment. Murder was deemed to be a term denoting a distinct and definite crime which continues to be a capital offense until final disposition of the indictment. 22 N.J. at 413. Moreover, while indicating that criminal statutes are strictly read to avoid penalties by construction, we added that the words of an enactment are to be given a rational meaning "in harmony with the obvious intent and purpose of the law." The majority concluded that

> [t]he history of the legislation and other statutes *in pari materia* 'may weigh heavily upon the issue of the meaning to be given a criminal statute'; and the 'common law meanings of words used may always be of importance in determining the exact meaning of what was intended to be conveyed.' [22 *N.J.* at 415-16; citations omitted.]

The history of New Jersey legislative enactments with respect to criminal statutes of limitation is persuasive evidence that no limitation period for murder was intended.

Defendant argues that *Gangemi v. Berry*, 25 N.J. 1 (1957), stands for the proposition that statutory construction must be limited to the words of the act absent an ambiguity therein, and requires a literal interpretation of *N.J.S.A.* 2A:159-2. First, we find an ambiguity in the statutory scheme since the death penalty has been voided while the statute remains unchanged. The impact of this apparent anomaly upon the meaning of *N.J.S.A.* 2A:159-2 is not so clear as to obviate our investigation of the legislative intent with respect to a limitations period for murder. Second, we refuse to put on judicial blinders where the intent of the Legislature is manifest. As we stated in *State v. Brown, supra,*

> [t]he rule of strict construction will not justify an 'unreasonable' interpretation; interpretation is the process by which the true intention of the law is ascertained and effectuated, and thus means the reasonably probable intention as shown by the symbols of expression, read and evaluated in the light of the context and the other relevant considerations. [22 *N.J.* at 416.]

The Legislature has always exempted murder from the statute of limitations. This is the consistent theme in the legislative treatment of the subject, and we have perceived no change in that attitude.

Finally, we do not accord much significance to the nonpassage of a bill introduced in the Legislature, S.688, 1974, "An Act concerning the removal of a time limitation within which criminal charges must be brought for certain high misdemeanors previously punishable by death and amending *N.J.S.A.* 2A:159-2." The sponsor apparently assumed that *Funicello, supra,* caused the crime of murder to be subject to the statute of limitations. His colleagues, in not enacting the bill, may have disagreed with this premise. As we stated in *Schmoll v. Creecy*, 54 N.J. 194, 203 (1969), "legislative inaction can mean only that the legislature did not act." In *Schmoll* we interpreted the wrongful death statute to permit illegitimate children to recover despite the lack of any such provision in its explicit language and with knowledge that several amendments to place such a provision in the act failed to achieve passage. This construction was necessary to save the statute from constitutional infirmity as it otherwise would have denied equal protection guarantees. Here we are faced with a limitations provision indirectly referring to a death penalty statute which has received a limiting construction by this Court so as to pass constitutional muster. We see no reason for ignoring the intent of the Legislature in passing the statute of limitations simply because we were compelled to perform judicial surgery on the death penalty act.

Chief Justice Weintraub made a further observation in *Schmoll*, which is particularly pertinent here, when he stated that ". . . the question as to the intent of the Legislature that adopted the wrongful death statute is a judicial question as to which neither the action nor inaction of a subsequent Legislature can be dispositive." 54 N.J. at 203. We have no doubt as to the intent of the Legislature which passed the statute of limitations. Our decision in the instant case does no more than fulfill the intent of every legislature in the history of our State which has enacted a statute of limitations—by recognizing that the crime of murder has always been regarded as a special offense to which no limitation period applies.

Based on the foregoing reasons, we hold that there is no statute of limitations for murder in New Jersey. Accordingly, the conviction of defendant is affirmed.

For affirmance—Chief Justice HUGHES and Justice MOUNTAIN, PASHMAN, CLIFFORD, SCHREIBER and HANDLER —6.

For reversal—None.